SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-974

WEST PENN POWER COMPANY,
a corporation,
Petitioner,

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respectfully submitted,

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The Petitioner, West Penn Power Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on July 16, 1975.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit (majority and dissenting), reported in 522 F.2d 302, are printed in Appendix A. The opinion of the United States District Court for the Western District of Pennsylvania, reported at 378 F.Supp. 941, is printed in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 16, 1975. A timely petition for rehearing *en banc* was denied on August 15, 1975. On October 31, 1975, this Honorable Court granted West Penn's Application For Extension Of Time In Which To File Petition For Writ Of Certiorari to and including January 12, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where substantive rights are involved which affect the public and an electric utility's ability to continue to provide efficient and reliable electric service, is the issuance of a notice of violation "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and is it ever within the unfettered discretion of the Administrator of the Environmental Protection Agency to ignore valid provisions of a state implementation plan which he has approved in accordance with provisions of the Clean Air Act, 42 U.S.C. § 1857, *et seq.* and valid state action taken pursuant to an approved state implementation plan?

2. Does the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, supply an independent basis for federal subject matter jurisdiction to review the issuance of a notice of violation by the Administrator of the Environmental Protection Agency pursuant to the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, when the issuance of the notice of violation is alleged to be invalid because it conflicts with provisions of a state implementation plan approved by the Administrator?

3. Can an informal administrative conference with the Administrator of the Environmental Protection Agency and/or defense of a federal enforcement action satisfy Petitioner's right under the Due Process Clause to a full and adequate hearing at a meaningful time to challenge the issuance under the Clean Air Act, 42 U.S.C. § 1857, *et seq.* of an invalid notice of violation?

4. Where the District Court held that Petitioner's claims were barred by Section 307 of the Clean Air Act, 42 U.S.C. § 1857h-5, but did not expressly address the

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existence of jurisdiction under 28 U.S.C. § 1337, should Petitioner's argument to the Court of Appeals that Section 307 does not preclude judicial review, particularly under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, be construed as an abandonment of its claim of federal subject matter jurisdiction pursuant to 28 U.S.C. § 1337?

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, are as follows:

"§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * *

"§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

"§ 704. Actions reviewable

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ."

Section 113 of the Clean Air Act, 42 U.S.C. § 1857c-8, provides in pertinent part:

"(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day

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after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

* * *

"(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

* * *

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

* * *

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

"(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan . . . (ii) more than 30 days after having been notified by the Ad-

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ministrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) of this section, . . . shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

* * *"

28 U.S.C. § 1337 provides that:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The Fifth Amendment to the United States Constitution states that:

"No person shall . . . be deprived of life, liberty or property, without due process of law."

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STATEMENT OF THE CASE

Petitioner is a Pennsylvania corporation and public utility, having its principal place of business in Greensburg, Pennsylvania. Petitioner provides electric utility service for approximately 470,000 customers in the southwestern and north central portions of the Commonwealth of Pennsylvania. Among Petitioner's facilities is the Mitchell Power Station, Boiler No. 33, a coal-fired electric generating facility in Washington County, Pennsylvania.

On May 31, 1972, the Respondent Administrator of the Environmental Protection Agency (hereinafter "Administrator") approved Pennsylvania's regulations* for the attainment of national primary ambient air quality standards within the Commonwealth (hereinafter "implementation plan"). Said implementation plan was submitted to and approved by the Administrator in accordance with the provisions of the Clean Air Act, 42 U.S.C. §1857 *et seq.* Included in the approved implementation plan were the regulations of the Respondent Pennsylvania Department of Environmental Resources (hereinafter "DER") pertaining to the control of sulfur oxide emissions from power plants. Pennsylvania's emission regulations** were immediately applicable. However, in

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*25 Pa. Code §§127-143. In addition to emission limitations, Pennsylvania's regulations contain the procedure for obtaining variances and provide that the filing of a petition for variance is to automatically stay prosecution for violation of emission limitations for a specified period of time.

**The sulfur oxide emission standards applicable to sources in the Monongahela Valley Air Basin where Petitioner's Boiler No. 33 is located are extremely stringent. For that reason, *inter alia,* the Administrator's approval of those standards as they apply to other power

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order to enable non-complying sources to avoid being held in violation of emission regulations, Pennsylvania's implementation plan also provided for variances from DER regulations.

On September 15, 1972, Petitioner applied to the DER for a variance for Boiler No. 33 of its Mitchell Power Station from, *inter alia,* the sulfur compound emission limitations contained in the Pennsylvania implementation plan.

On September 13, 1973, despite the pendency of Petitioner's variance application which, as provided by the implementation plan, operated as an automatic stay of prosecution,* the Administrator issued to Petitioner a notice of violation pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 1857c-8(a)(1), which asserted, *inter alia,* that Boiler No. 33 was in violation of the sulfur emission standards contained in the Pennsylvania implementation plan.

On September 19, 1973, the DER granted Petitioner a variance from its sulfur emission standards until June 30, 1976, however, directing Petitioner, as a condition to the variance, to install a sulfur emission control device. Petitioner believes and has asserted that the variance granted by DER will not interfere with the attainment or maintenance of ambient air quality standards. Petitioner appealed the action of the DER to the Environ-

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plants has been remanded for re-examination by the United States Court of Appeals for the Third Circuit. See, *Duquesne Light Co. v. Environmental Protection Agency,* 522 F.2d 1186 (3d Cir. 1975).

*25 Pa. Code § 141.5. See also the Pennsylvania Bulletin of April 28, 1973, page 808 which extended the automatic stay of prosecution until final action was taken by the DER on variance applications.

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mental Hearing Board pursuant to Pennsylvania's Administrative Agency Law* and Administrative Code of 1929.**

On December 20, 1973, Petitioner, faced with conflicting agency action, i.e., the threat of federal prosecution while state procedings approved by the Administrator as part of Pennsylvania's implementation plan were pending, filed a complaint for declaratory and equitable relief in the United States District Court for the Western District of Pennsylvania. As subsequently amended, the suit named the Administrator, the DER and the Secretary of the DER as defendants and sought, *inter alia,* injunctive relief to prevent the Administrator from enforcing the notice of violation allegedly issued pursuant to Section 113 of the Clean Air Act. Jurisdiction was alleged under Section 304 of the Clean Air Act, 42 U.S.C. § 1857h-2; 28 U.S.C. §§2201 and 2202; 5 U.S.C. § 701 *et seq.;* and 28 U.S.C. § 1337.

On June 19, 1974, the District Court dismissed Petitioner's amended complaint for lack of subject matter jurisdiction holding, in reliance on *Getty Oil Co. v. Ruckelshaus,****** that the issues presented all involved the reasonableness of the Pennsylvania implementation plan and, thus, should have been raised by Petitioner in an appeal to the Court of Appeals for the Third Circuit in June of 1972 pursuant to Section 307 of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(2).

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*Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. § 1710.1 *et seq.*

**Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-1 *et seq.*

***467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).

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The judgment of the District Court was affirmed by a divided three-judge panel of the Court of Appeals for the Third Circuit which held that, although the Petitioner's issues had been improperly characterized by the District Court as falling within Section 307, jurisdiction did not lie under either the Administrative Procedure Act or 28 U.S.C. § 1337 to determine whether the issuance of the notice of violation by the Administrator was lawful. Judge Adams dissented from the majority opinion stating, *inter alia*, that he believed that the notice of violation issued to Petitioner was judicially reviewable under the Administrative Procedure Act, *supra*.

On August 15, 1975, Petitioner's request for rehearing *en banc* was denied with three members of the Court of Appeals voting to grant the Petition For a Rehearing *en banc*.*

*On February 18, 1975, the Administrator issued a compliance order based on the illegal notice of violation. On June 27, 1975, Petitioner filed a plan of compliance in accordance with the compliance order. However, the Administrator threatened to reject Petitioner's compliance plan. On March 20, 1975, Petitioner filed a Petition For Review with the Court of Appeals for the Third Circuit, docketed at 75-1259. On May 19, 1975, the Court of Appeals issued a stay of all enforcement activities by the Administrator. Argument on the Petition was held on October 2, 1975, following which the Administrator and Petitioner entered into a court approved stipulation which provided that disposition of the Petition would be deferred until September 30, 1975 and that enforcement activities would be stayed until thirty days after such disposition. The Administrator and Petitioner have requested the Court of Appeals to approve a thirty-day extension of the stipulation. On June 27, 1975, Petitioner requested approval from the Pennsylvania Public Utility Commission to terminate operation of Boiler No. 33.

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REASONS FOR GRANTING THE WRIT

1. Review Of The Decision Below By This Honorable Court Is Necessary To Clarify Federal-State Relationships Under The Clean Air Act.

The questions presented by this case involve important issues in a developing area of the law involving the unique federal-state relationship inherent under the Clean Air Act, *supra*. Ultimately, this case involves socio-economic questions concerning the energy resources of this nation.

In the case of *Train v. NRDC, Inc.*, 43 U.S.L.W. 4467 (U.S. April 16, 1975), this Court addressed the question of whether provisions of state environmental regulations providing for variances from emission limitations were valid because they constituted postponements of a state implementation plan which the Administrator had approved under the statutory scheme established by the Clean Air Act. This case presents an important corollary, i.e., whether the Administrator may ignore valid variance provisions of a state implementation plan by taking enforcement action which conflicts with provisions of the plan and prevents persons subject to its emission limitations from obtaining relief specifically provided for by the approved plan. Petitioner believes that unless this Court determines whether a variance, valid under the test espoused by this Court in *Train v. NRDC, Inc., supra,* is a defense to an enforcement action by the Administrator, then the Administrator will not be constrained from issuing notices of violation to persons who are complying with a state implementation plan, even without a variance.

Petitioner finds itself in a dilemma. However, Petitioner's dilemma, as noted by the Court below, is unlike

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the dilemma presented in *Getty Oil Co. v. Ruckelshaus, supra,* quoted approvingly by this Court in *Train v. NRDC, Inc., supra,* because it is not a result of Petitioner's attempt to circumvent a state implementation plan. To the contrary, Petitioner has in all respects attempted to comply with the Pennsylvania implementation plan. If the Administrator's action in this matter is permitted to go unchecked, it will have the effect of undermining state implementation plans and frustrating Congress' intent to give the states primary authority in the field of air pollution control. *Train v. NRDC, Inc., supra.*

2. Review Of The Decision Below Is Necessary To Resolve Its Conflict With The Decisions Of Other Courts Of Appeals On The Question Of Whether The Administrative Procedure Act Provides An Independent Basis For Federal Subject Matter Jurisdiction.

The Administrative Procedure Act, 5 U.S.C. § 702, provides that, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The *ratio decidendi* below was that the above-quoted provision does not constitute a jurisdictional grant, i.e., it does not invest the district courts with subject matter jurisdiction absent the existence of another and independent basis for federal jurisdiction. In so holding, the Court of Appeals was rejecting its decision in *Charlton v. United States,* 412 F.2d 390 (3d Cir. 1969) and was following at least two of its other decisions; *Zimmerman v. United States,* 422 F.2d 326 (3d Cir. 1970); *Local 542, International Union of Operating Engineers, AFL-*

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CIO v. NLRB, 328 F.2d 850 (3d Cir. 1964), *cert. denied*, 379 U.S. 826 (1964).*

The vast majority of the cases on this point, however, have held that the Administrative Procedure Act is an independent source of federal subject matter jurisdiction.**

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*Other cases which have also concluded that the Administrative Procedure Act does not provide an independent basis for federal subject-matter jurisdiction include: *Bramblett v. Desobry*, 490 F.2d 405 (6th Cir. (1974), *cert. denied*, 419 U.S. 872 (1974); *Arizona State Dept. of Public Welfare v. Department of Health, Education & Welfare*, 449 F.2d 456 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967). See also, *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912 (2d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960); *City of Dallas, Texas v. Rentzel*, 172 F.2d 122 (5th Cir. 1949), (per curiam), *cert. denied*, 338 U.S. 858 (1949).

**See e.g., *Toilet Goods Ass'n. v. Gardner*, 360 F.2d 677 (2d Cir. 1966), *aff'd.*, 387 U.S. 167 (1967); *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975); *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975); *Charles River Park "A", Inc. v. Dept. of Housing and Urban Development*, 519 F.2d 935 (D.C. Cir. 1975); *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975) (indicating that even the Third Circuit Court of Appeals has found APA to supply jurisdiction; also indicating that *Dunlop v. Bachowski*, 85 S.Ct. 185 (1975) is not determinative of this issue); *Ruiz-Olan v. Secretary, Dept. of Health, Education & Welfare*, 511 F.2d 1056 (1st Cir. 1975); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975); *Elton Orchards, Inc. v. Brennan*. 508 F.2d 493 (1st Cir. 1974); *Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (compiling cases); *Young v. United States*, 498 F.2d 1211 (5th Cir. 1974); *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973); *In Re School Board of Broward County, Florida*, 475 F.2d 1117 (5th Cir. 1973); *Aguayo v. Richardson*, 473 F.2d

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Reasons for Granting the Writ.

It has been suggested by at least one text writer that the decisions of this Court in *Rusk v. Cort,* 369 U.S. 367 (1962) and *Flast v. Cohen,* 392 U.S. 83 (1968), settled the question contrary to the holding below. Davis, *Administrative Law Treaties,* § 23.02 (Supp. 1970). Commenting on this view in *Aguayo v. Richardson, supra,* Judge Friendly observed that in neither of the above Supreme Court cases could jurisdiction have been sustained in any other manner. He was concerned, however, that no reference was made to the issue and doubted that so important a question had been meant to be decided *sub silentio.* The instant case offers this Court an opportunity to resolve these conflicts.

1090 (2d Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); *Maddox v. Richardson,* 464 F.2d 617 (6th Cir. 1972); *Davis v. Richardson,* 460 F.2d 772 (3d Cir. 1972); *Littell v. Morton,* 445 F.2d 1207 (4th Cir. 1971); *Brandt v. Hickel,* 427 F.2d 53 (9th Cir. 1970); *Moore-McCormack Lines, Inc. v. United States,* 413 F.2d 568 (Ct. Cl. 1969); *Brennan v. Udall,* 379 F.2d 803 (10th Cir. 1967); *Cappadora v. Celebrezze,* 356 F.2d 1 (2d Cir. 1966); *Freeman v. Brown,* 342 F.2d 205 (5th Cir. 1965); *McEachern v. United States,* 321 F.2d 31 (4th Cir. 1963); *Deering Milliken, Inc. v. Johnston,* 295 F.2d 856 (4th Cir. 1961).

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3. Review Of The Decision Below Is Necessary To Resolve Its Conflict With the Decisions Of Other Courts Of Appeals On The Question Of Whether Agency Action Which Is Unlawful Can Be Discretionary.

It is generally recognized that judicial review is normally available to insure that administrative sanctions are imposed only in accordance with legislatively authorized rules. See, e.g., *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942).

At least two circuit courts of appeals have held that no clearer example of a non-discretionary duty can be found than an agency's responsibility to comply with its own regulations. The strongest statement of this proposition is contained in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970):

> "[I]t is incontestable that many areas of government contracting are properly left to administrative discretion; the courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeters thereof.... When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review.
>
> "The regulations of the Federal Aviation Administration have the force of law.... The procurement regulations also have the force of law.... When a prima facie showing of the violation of those regulations has been made the agency may not be heard to say that the matter in question has been left to its discretion." (Footnote and citations omitted). Accord, *Ness Investment Corp. v. United States Department of Agriculture, Forest Service*, 512 F.2d 706, 714-5 (9th Cir. 1975).

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It would seem clear that the Administrator has discretion to proceed beyond a notice of violation only if that notice has been properly issued. This was forcefully illustrated by Judge Adams who made the following statement in his dissenting opinion:

> "Although some aspects of a given decision may be committed entirely to the policy judgment of an expert administrator, where legal standards are implicated the courts are available to persons aggrieved by the decision in order to assure that the agency has adhered to the proper standards in carrying out its duty [footnote omitted]."

Judge Adams specifically grounded his dissent on the fact that the Administrative Procedure Act, *supra,* provided an independent basis for subject matter jurisdiction, but noted that jurisdiction would also lie under one of the general grants of jurisdiction such as 28 U.S.C. § 1337. *(Judge Adams also noted that the majority's view that Petitioner had waived jurisdiction provided by 28 U.S.C. § 1337 was "unnecessarily restrictive.")*

Petitioner alleged in its Amended Complaint that it was not violating the Pennsylvania implementation plan. The Court of Appeals ignored this allegation and, paradoxically, despite finding that the issuance of a notice of violation was non-discretionary, held that the exception for "action committed to agency discretion by law" was applicable because the Administrator's decision to enforce a notice of violation is discretionary.

In *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), this Court held that the exception to judicial review for, "action committed to agency discretion by law" under the Administrative Procedure

Act, 5 U.S.C. § 701(a)(2), is a very narrow one—"applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " Obviously, there is "law to apply" in the instant case and, thus, the exemption for action "committed to agency discretion" is inapplicable.

Reliance on the courts of this nation to rectify the failings of our administrative system is indispensable to the protection of individual rights. Individuals have a right to resist administrative action which is not authorized by statute. These principles should be developed to their fullest. For that reason and because the decision of the court below is in direct conflict with the authorities cited above, Petitioner believes that the decision below merits this Court's review.

4. The Holding Below That Issuance Of A Notice Of Violation Under The Clean Air Act Is Not "Final Agency Action" Subject To Review Under The Administrative Procedure Act Misconstrues And Misapplies Controlling Authority Of This Honorable Court And Raises Significant And Recurring Problems Involving Federal Jurisdiction.

The Court below held that issuance of a notice of violation is not "final agency action for which there is no other adequate remedy in court" as required for review under the Administrative Procedure Act, 5 U.S.C. § 704, on the basis that the Administrator has an opportunity under the Clean Air Act to follow a violation notice with either a compliance order or a civil suit for enforcement. Thus, the Court below concluded, in reliance on *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 417-18 (1942), that a viola-

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tion notice "has neither an independent coercive effect nor the force of law." In *Columbia Broadcasting System, Inc. v. United States supra,* however, this Court made the following statement:

> "The regulations [of which review was sought] are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable *and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance . . .*" (Citations omitted.) (Emphasis added.)

As the above quotation illustrates, the Court of Appeal's holding misconstrues and misapplies controlling authority of this Court dictating that courts take a practical approach to the concept of finality.*

Although the Administrator may, as he has done in the instant case, elect to follow issuance of the violation notice with a compliance order, this avenue of proceeding is not mandatory. After 30 days the Administrator may, in addition, institute an enforcement action. Thus, the effect of the issuance of a violation notice is immediate and coercive, requiring Petitioner to expend tens of millions of dollars for a sulfur emission control device

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*See also: *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956); *Frozen Food Express v. United States,* 351 U.S. 40 (1956).

or to expose itself to substantial fines and/or imprisonment of its officers.*

The question of finality obviously is of the most immediate importance to Petitioner and its rate-paying customers. Other potential sources of pollution, however, also have a vital interest in the resolution of the problem. Under the Clean Air Act, compliance with national primary ambient air quality standards must be achieved within a specified period after the Administrator's approval of a state implementation plan. For many states, the grace period has now expired. It can be expected that numerous violation notices will follow such expiration, particularly in view of the fact that the effect of the decision below is to authorize the Administrator to take enforcement action against sources which have obtained a valid variance.

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*In *United States Steel Corp. v. Fri,* 364 F.Supp. 1013 (N.D. Ind. 1973), the District Court concluded that issuance of a compliance order is final agency action, subject to review under the Administrative Procedure Act. In view of the equivalent status of violation notices and compliance orders under the Clean Air Act's scheme of enforcement, the decisions below and that in the *United States Steel Corp. v. Fri, supra,* are in direct conflict.

5. The Holding Below Renders The Clean Air Act Unconstitutional Because It Denies Petitioner The Opportunity To Defend Itself Against Prima Facie Illegal And Unwarranted Agency Action.

The Court below held that the denial of a hearing in the instant suit would not result in a deprivation of due process because Petitioner has two alternate and adequate avenues of relief available, to-wit, an appeal to the Pennsylvania Environmental Hearing Board from the DER's grant of a variance and, as noted above, defending a subsequent district court enforcement action instituted by the Administrator. Petitioner respectfully submits that said holding conflicts with decisions of this Court and presents an important constitutional question meriting this Court's review.

It is by now well-settled that due process requires the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Moreover, such hearing must be held "at a meaningful time and in a meaningful manner" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

Clearly, however, the appeal to the Environmental Hearing Board does not satisfy the requirement of a full hearing at a meaningful time. Indeed, the implication of the decision of the Court below is that such an appeal is irrelevant since the issuance of the notice of violation is unappealable while the appeal to the Environmental Hearing Board is pending. Furthermore, the invalidity of the notice of violation is, on its face, irrelevant in the state administrative appeal from the grant of a variance. Consequently, regardless of the outcome of that appeal, including presumably a finding that Petitioner was in

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compliance, the Administrator could still have issued and enforced the notice of violation under the holding below. Moreover, even if Petitioner had obtained a suitable variance without a requirement that it install a sulfur emission control device, the Administrator could still enforce the notice of violation.

Similarly, the possibility of a subsequent enforcement action and defense thereto does not satisfy the "meaningful time" requirement of this Court's rulings and established constitutional due process standards. As a practical matter, because of its virtually unlimited potential liability, a source is unable to continue to disregard agency demands pending judicial resolution of the underlying dispute and must either involuntarily accede to such demands prior to any hearing or act at its peril.

In *Ex Parte Young*, 209 U.S. 123 (1908), petitioner sought to invalidate a similar statutory scheme providing for stiff penalities, prior to a hearing, against any railroad which charged less than the rates set by a state regulatory commission. The petitioner claimed that these provisions were confiscatory and, therefore, unconstitutional. This Court stated:

> "The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. . . ." Accord, *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920).

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CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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DATED: January 9, 1976

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2050

WEST PENN POWER COMPANY, a corporation,
Appellant

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania

(D.C. Civil No. 73-1083)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 28, 1975
Before VAN DUSEN, ADAMS and GARTH, *Circuit Judges*

Harold R. Schmidt, Esq., Lawrence A. Demase, Esq. and Edwin J. Strassburger, Esq., Rose, Schmidt and Dixon, Pittsburgh, Pa.
and
Thomas K. Henderson, Esq., Greensburg, Pa.,
Attorneys for Appellant

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Wallace H. Johnson, Assistant Attorney General; Edmund B. Clark, Martin Green, and John E. Varnum, Attorneys; U.S. Department of Justice, Washington, D.C.,
Attorneys for Appellee Russell Train

Barbara H. Brandon, Assistant Attorney General, Commonwealth of Pennsylvania, Harrisburg, Pa.
Attorney for Appellee Maurice K. Goddard and Appellee Department of Environmental Resources of the Commonwealth of Pennsylvania

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OPINION OF THE COURT

(Filed July 16, 1975)

VAN DUSEN, *Circuit Judge.*

This appeal challenges a June 19, 1974, district court order dismissing West Penn Power Company's amended complaint for lack of jurisdiction.[1] The dismissed complaint sought injunctive and declaratory relief protecting West Penn from any duty to comply with the particulate and sulfur compound emission standards established

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1. The district court opinion and order of June 19, 1974, are docketed as Document #24 in Civil No. 73-1083 (W.D. Pa.). The memorandum and order of August 13, 1974, denying the motion for reconsideration of the June 19 order was docketed as Document #29 in Civil No. 73-1083 (W.D. Pa.).

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as part of Pennsylvania's implementation plan[2] pursuant to the Clean Air Act, 42 U.S.C. § 1857 *et seq.*[3]

West Penn did not file a petition for review under 42 U.S.C. § 1857h-5(b)(1)[4] to challenge the implementa-

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2. 25 Pa. Code Ch. 123 contains the particulate matter and sulfur compound emission standards relevant to this action. 25 Pa. Code Chs. 121-141 comprise the regulations which form Pennsylvania's implementation plan. The plan was adopted by the Environmental Quality Board of the Commonwealth of Pennsylvania on January 27, 1972, and approved by the Administrator of the Environmental Protection Agency (EPA) on May 31, 1972. 37 Fed. Reg. 10889; 42 U.S.C. § 1857h-5(a)(1) and (2).

3. The Clean Air Act was amended by the Air Quality Act of 1967, 81 Stat. 485, and the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676. The 1970 amendments to the Clean Air Act required the EPA to propose primary and secondary air quality standards. 42 U.S.C. § 1857c-4. Within nine months after the promulgation of each of these standards, every state was to adopt and submit to the Administrator of the EPA "a plan which provides for implementation, maintenance, and enforcement" of the standards. 42 U.S.C. § 1857c-5. In accordance with the statutory scheme, Pennsylvania held four public hearings on its proposed plan. The record does not reveal whether West Penn appeared at any of the hearings, which were held from December 1-4, 1971. The plan, including the emission standard which generated this suit, was adopted by the Pennsylvania Environmental Quality Board on January 27, 1972; the plan provisions relevant to this suit were approved by the EPA Administrator on May 31, 1972. 37 Fed. Reg. 10889. For a fuller description of the legislative scheme, see *Duquesne Light Co. v. EPA*, 481 F.2d 1, 3-5 (3d Cir. 1973).

4. 42 U.S.C. § 1857h-5(b)(1) provides in pertinent part:

> "A petition for review of the Administrator's action in approving or promulgating any implementation

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tion plan when it was approved, but petitioned the Pennsylvania Department of Environmental Resources (DER) for a variance[5] from the particulate, visible, and sulfur compound emission standards applicable to Boiler No. 33 of West Penn's Mitchell Power Station. On September 13, 1973, before DER had acted on its variance request,[6] West Penn received from EPA a Notice of Violation[7] charging that the Mitchell Power Station was in violation of the applicable particulate and sulfur com-

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plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."

In addition to challenging the plan as a whole under the above statute, West Penn could have sought relief from the operation of particular requirements of the plan by seeking a variance pursuant to 35 Purdon's Pa. Stats. § 4004.41 and 42 U.S.C. § 1857c-5(a)(3).

5. See generally 25 Pa. Code Ch. 141. Chapter 141 was adopted January 27, 1972, and approved by EPA on May 31, 1972.

6. The petition for variance, originally filed September 15, 1972, was amended on June 7, 1973. In its amended petition, West Penn proposed to reduce sulfur compound emissions by burning low sulfur coal and by building a "tall stack" to reduce ground-level concentration of the pollutant. West Penn further stated its intent to "install sulfur-control equipment as soon as commercially proven, reliable, and environmentally acceptable equipment is available." Particulate matter was to be controlled by use of an electrostatic precipitator and by chemical treatment of the flue gas.

7. The notice of violation was issued pursuant to 42 U.S.C. § 1857c-8(a)(1), which provides:

"Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an ap-

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pound emission standards. Thereafter, on September 19, 1973, DER granted West Penn a temporary variance until June 30, 1976, from the sulfur emission standards.[8] The variance, however, rejected West Penn's proposal that it use a "tall stack" and low sulfur coal to meet the standards;[9] installation of a "scrubber" device for controlling sulfur compound emissions was a condition of the variance. This temporary variance has not been approved by EPA.[10]

West Penn first appealed DER's variance order to the Pennsylvania Environmental Hearing Board[11] and then, on December 20, 1973, filed this action against the Administrator of EPA, Train, the Secretary of DER,

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plicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section."

8. Particulate emission standards were to be met by November 1, 1973.

9. See note 6 *supra.*

10. See 42 U.S.C. § 1857c-5(a)(3); *Train v. Natural Resources Defense Council, Inc.,* 43 U.S.L.W. 4467, 4476-77 (U.S., Apr. 16, 1975); *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349, 358 (3d Cir. 1972), *cert denied,* 409 U.S. 1125 (1973).

11. See 35 Purdon's Pa. Stats. §§ 4004(4.1), 4013.5, and 71 Purdon's Pa. Stats. § 1710.41. The action is docketed at Environmental Hearing Board No. 73-330.

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Goddard, and DER.[12] The complaint, as amended,[13] asked for a declaratory judgment both that the tall stack scheme for effecting compliance with Pennsylvania's implementation plan could not be rejected by the defendants and that West Penn was not presently violating the plan. West Penn also sought preliminary and permanent injunctions against EPA enforcement of the September 13, 1973, Notice of Violation and DER enforcement of the order to install a "scrubber."[14] Jurisdiction was predicated upon "the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, specifically 42 U.S.C. § 1857h-2 [entitled "Citizen suits—Establishment of right to bring suit"];[15]

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12. Before filing suit in federal court, West Penn participated in a series of meetings held by EPA from October 18 to November 2, 1973. Among the topics under investigation at this conference was the state of the art of sulfur emission control.

13. The original complaint named only EPA and DER as defendants. After a March 7, 1974, hearing on the motions to dismiss filed by EPA and DER in January 1974, West Penn amended its complaint to add the Secretary of DER as a defendant.

14. In its brief, West Penn avers that the complaint also asked for "a decree that the installation of flue gas desulfurization device ["scrubber"] on Boiler No. 33 would not effect compliance with the Pennsylvania implementation plan after the expiration of the variance period." Brief for Plaintiff-Appellant at 5. We agree with defendant Secretary of DER that the complaint cannot be construed as raising such an issue.

15. "§ 1857h-2. Citizen suits—Establishment of right to bring suit.

"(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(2) against the Administrator where there is alleged a failure of the Administrator to perform

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The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*;[16] The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; and 28 U.S.C. § 1337."[17] Amended Complaint, ¶ 6, Civil Action No. 73-1083, Document #20 (W.D. Pa.).

On June 19, 1974, after the three defendants had filed F.R. Civ. P. 12(b) motions to dismiss for lack of subject matter jurisdiction,[18] the district court dis-

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any act or duty under this chapter which is not discretionary with the Administrator.

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Notice

"(b) No action may be commenced—

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator."

16. See Part II, *infra*. Neither the APA nor 42 U.S.C. § 1337, see note 17, *infra*, was alleged as a jurisdictional basis in the original complaint.

17. "§ 1337. Commerce and anti-trust regulations

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The complaint relied on the Clean Air Act, 42 U.S.C. § 1857, *et seq.*, as an act of Congress regulating commerce within the scope of §1337.

18. DER and Goddard also argued that the Eleventh Amendment precluded the court from exercising personal jurisdiction over them. Other grounds for dismissal urged by DER and Goddard were: failure to

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missed the amended complaint in its entirety, as to all defendants. The court first determined that it lacked jurisdiction over the EPA Administrator, Train. Relying on *Getty Oil Co., v. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the district court concluded that neither the Declaratory Judgment Act (DJA) nor the Administrative Procedure Act (APA) furnished a jurisdictional base for West Penn's suit against Train.[19] No jurisdiction lay under § 1857h-2 because West Penn had not given Train 60 days' notice of the suit, as required by that section.[20] Having thus

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join indispensable parties; no exhaustion of administrative remedies; failure to state a claim upon which relief could be granted; and the abstention doctrine.

19. The court considered and rejected the allegation of jurisdiction under 28 U.S.C. § 1337 together with the APA and DJA claims.

20. The district court opinion set forth the notice provisions applicable to subsection (a)(1), rather than (a)(2). See note 15 *supra.* However, 60 days' notice is required in either case, so that the mis-citation was immaterial.

As a second reason for rejecting § 1857h-2 jurisdiction, the district court relied on the discretionary nature of the Administrator's action "in approving the Pennsylvania plan, and including therein a provision which prevents plaintiff from using the so-called tall stack as a method of compliance with the ambient air standards." § 1857h-2 applies only to cases where the Administrator fails to perform a non-discretionary Act. To the extent that *Train v. Natural Resources Defense Council,* 43 U.S.L.W. 4467 (U.S., Apr. 16, 1975), suggests the Administrator's discretion is more limited than the district court inferred from its reading of 42 U.S.C. §1857c-5, this second ground might not, alone, be dispositive of the claim under § 1857h-2. The failure to give notice, however, suffices to preclude § 1857h-2 jurisdiction. Moreover, West Penn has not appealed this jurisdictional

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rejected each of West Penn's jurisdictional claims,[21] the district court went on to find that, in any event, 42 U.S.C. § 1857h-5(b)(1) and (2)[22] foreclosed district court jurisdiction over the action. Since the district court determined that all issues raised in the complaint could have been brought before the court of appeals in an action challenging the Pennsylvania implementation plan, it held that West Penn's exclusive recourse against Train was a proceeding under 42 U.S.C. § 1857h-5(b)(1).

As to DER, the court held the action barred by the Eleventh Amendment.[23] The court also concluded that it lacked jurisdiction over the Secretary of DER, Goddard. The court viewed West Penn's assertion that DER lacked power to reject a "tall stack" or to direct installation of a "scrubber" as, essentially, a challenge to the Pennsylvania implementation plan. Such a challenge could be brought only in the court of appeals pursuant to 42 U.S.C. § 1857h-5(b)(1) and (2). The district court opinion recognized that a variance from the air quailty standards would remedy West Penn's complaint, but noted that the temporary variance issued by DER on September 19, 1973, was ineffective without EPA ap-

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holding. But see *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 373 F. Supp. 1089, 1092 (D. D.C. 1974).

21. See note 19 *supra*.

22. See note 4 *supra*. 42 U.S.C. § 1857h-5(b)(2) provides:

> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

23. This holding was not appealed.

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proval, which the court could not compel.[24] This lack of jurisdiction over the EPA Administrator, Train, rendered federal court intervention "futile," since Goddard could not grant a variance or approve a "tall stack" without

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24. See discussion at 5-6, *supra*. The district court relied on *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974), in stating that a valid variance could only be obtained upon application of the Governor of Pennsylvania for a one-year extension of the compliance date for the implementation plan. This elaborate procedure for obtaining a postponement of the compliance date is contained in 42 U.S.C. §1857c-5(f). Since the district court authored its opinion, the Supreme Court has reversed the Fifth Circuit decision, *supra*, and held, in *Train v. NRDC*, 43 U.S.L.W. 4467, 4471 (U.S., Apr. 16, 1975), that a variance can be obtained pursuant to § 1857c-5(a)(3), rather than § 1857c-5(f). Under § 1857c-5(a)(3), a variance becomes effective merely upon approval by the EPA Administrator. Further, the Administrator is to grant the variance "if he determines that it meets the requirements of [§ 1857c-5(a)(2), which sets forth criteria for an acceptable implementation plan] and has been adopted by the State after reasonable notice and public hearings." The Supreme Court's holding in *NRDC*, however, does not invalidate the district court's finding that West Penn had not obtained an effective variance, since the EPA had not approved the temporary variance under § 1857c-5(a)(3). See 43 U.S.L.W. at 4476-78 and n.28. Nor, we believe, does the district court's reliance on the Fifth Circuit decision in *NRDC* undercut its conclusion that it lacked authority to compel the grant of a variance to West Penn. A mandamus action, though not proper under § 1857c-5(f) because of the great discretion which the district court identified as implicit in that section, might be proper under §1857c-5(a)(3). However, no factual or legal argument made by West Penn in this action would support issuance of a mandamus. Therefore, West Penn was not prejudiced by the district court's view that issuance and approval of a variance was discretionary.

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EPA concurrence. Finally, the court found that Pennsylvania law (35 Purdon's Pa. Stats. § 4004(4.1)) offered West Penn ample relief, without any need for federal intervention.

West Penn filed a timely motion for reconsideration challenging the dismissal of the complaint only as to Train and Goddard. On September 10, 1974, after the district court denied the motion, West Penn lodged this appeal. Although it is not clear precisely which aspects of the district court's decision West Penn is appealing,[25]

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25. For example, the complaint seeks declaratory and injunctive relief as to two issues: (1) whether West Penn is presently in violation of the plan's emission standards, and (2) whether a tall stack would comply with the plan. See note 14, *supra*. In arguing that the district court erred in holding that § 1857h-5(b)(2) required dismissal of the complaint, West Penn urges only that the first issue could not have been raised in a subsection (b)(1) proceeding. Brief for Plaintiff-Appellant at 13-17. It thus appears to concede that the district court properly dismissed the complaint as to the second issue. Such a concession would also amount to an admission that Goddard was properly dismissed as a defendant, since the only cause of action the complaint alleged against Goddard was that he lacked authority to reject a tall stack and order installation of a scrubber as a means of achieving compliance with the plan. Similarly, West Penn's argument that the district court has jurisdiction under the APA postulates power to decide only the first issue raised in the complaint. Brief for Plaintiff-Appellant at 18-23. At the same time, however, the summary of the argument describes the brief as arguing "at length" that subsection (b)(2) did not bar "jurisdiction to consider West Penn's claims against the remaining defendants." Brief for Plaintiff-Appellant at 10, n.3. It is true that arguments in support of inconsistent alternative claims are permitted under the Federal Rules of Civil Procedure. In this case, however, the arguments are not alternative, but serial, and the inconsistencies in

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we will treat the appeal as raising the following three questions:

> (1) whether the district court properly concluded that § 1857h-5(b)(1) and (2) required dismissal of the complaint as to both Train and Goddard;
>
> (2) whether the district court has jurisdiction under the APA[26] of matters raised in the complaint; and
>
> (3) whether due process requires the district court to assume jurisdiction and decide the issues raised in the complaint.

I. EXCLUSIVITY OF THE REVIEW PROVIDED IN 42 U.S.C. § 1857h-5(b)(1) and (2)

West Penn claims that EPA could not cite the utility for violating Pennsylvania's implementation plan since West Penn, by filing a petition for a variance on September 15, 1972, received an automatic stay of prosecution for violation of the particulate and sulfur compound emission standards. This argument relies on 25 Pa. Code § 141.5, which provides:

> "(a) A petition which complies with the requirements of § 141.11 of this Title (relating to filing), and which is received by the Department

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the arguments briefed merely produce unnecessary confusion into a case not otherwise complex.

26. West Penn does not argue on this appeal that jurisdiction lies under § 1337. *But see Dunlop v. Bachowski*, 43 U.S.L.W. 4669, 4671 (June 2, 1975). It also concedes that the DJA is not jurisdictional in nature, but "defines the form of relief available to an aggrieved party under the Administrative Procedure Act." Brief for Plaintiff-Appellant at 11, n.4.

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> within six months of the effective date of this Chapter, shall operate prospectively as an automatic stay of prosecution for violations of those provisions of this Article with respect to which the variance is sought, until one year after the effective date of this Chapter or until the Department takes action on such petition, whichever occurs first, except that the filing of a petition for a variance, or the grant thereof, shall not relieve the petitioner from full compliance with any orders and permits previously issued or any stipulations and agreements previously entered into by the Department, nor shall such filing in any way preclude the Department from pursuing any and all remedies available to it, at law or in equity, to enforce such orders, permits, stipulations, or agreements."

West Penn avers that this stay was in effect on September 13, 1973, "and will remain so at least through June 30, 1975."[27] Brief for Plaintiff-Appellant at p. 10, n.3.

In addition, West Penn argued, both in its brief at 9 and before this court, that it has a variance from DER, granted September 19, 1973, which exempts it from complying with the sulfur emission standards until June 30,

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27. West Penn does not reveal how it arrived at the June 30, 1975, date. Even if the stay operated for a year after the filing of the petition, rather than a year from the effective date of 25 Pa. Code Ch. 141, the stay would expire no later than June 7, 1974. Since, however, the effective date of Chapter 141 would be May 31, 1972 —the date on which the plan was approved by EPA—the stay would have expired May 31, 1973. This case does not, therefore, raise any conflict between the state plan and the federal Administrator's action. *Train v. NRDC,* 43 U.S.L.W. 4467 (U.S., Apr. 16, 1975), does not have the relevancy assigned it by West Penn's counsel at oral argument.

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1976.[28] This contention that West Penn is not in violation of the plan thus poses no challenge to "the Administrator's action in approving or promulgating any implementation plan," 42 U.S.C. § 1857h-5(b)(1); rather, it relies on the validity of the plan provisions for granting variances. We therefore agree with West Penn that this particular contention could not have been raised in a § 1857h-5(b)(1) proceeding. It follows that the district court erred in finding that subsection (b)(2) barred its jurisdiction to decide this claim.

It also appears that subsection (b)(2) would not foreclose the district court from deciding whether a tall stack was a proper method of complying with the plan. The plan prescribes certain air quality standards which must be met, not specific methods of attaining those standards. A subsection (b)(1) suit would challenge only the plan—that is, the standards, and not the methods of compliance. Thus, subsection (b)(2) would not prevent West Penn from raising the tall stack issue in the district court.[29] See, generally, *Note: Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard,* 1974 Duke L.J. 382, 384; L. Jaffe,

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28. We note that this argument is not legally sustainable. A variance is not effective until it is approved by the EPA Administrator. 42 U.S.C. § 1857c-5(a)(3). Such approval is lacking in this case. See note 10, *supra.* Moreover, even if the argument were valid, West Penn would be subject to citation for violating the particulate emission standards at any time after November 1, 1973. See note 8.

29. This case is thus different from *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert denied,* 409 U.S. 1125 (1973), where the plaintiff challenged the Delaware plan regulations themselves. Id. at 355, See Part II, *infra.*

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Judicial Control of Administrative Action, 353-63, 372-76 (1965). However, unless there was an affirmative grant of jurisdiction in the district court, the dismissal for lack of jurisdiction was still proper.

II. JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT AND THE DECLARATORY JUDGMENT ACT

The district court relied on this court's decision in *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972), *Cert. denied,* 409 U.S. 1125 (1973), for the proposition that neither the DJA, 28 U.S.C. §§2201 and 2202, nor the APA, 5 U.S.C. §§701 *et seq.,* could "afford a basis for jurisdiction." 467 F.2d at 356. See also *PBW Stock Exchange, Inc. v. SEC,* 485 F.2d 718 (3rd Cir. 1973); *Zimmerman v. United States,* 422 F.2d 326 (3rd Cir.), *cert. denied,* 399 U.S. 911 (1970). The plaintiff in *Getty* had filed suit in the Delaware district court, attacking certain regulations which had been approved by the EPA Administrator as part of that state's implementation plan under the Clean Air Act. The district Court determined that jurisdiction was properly invoked under 28 U.S.C. §1337, the DJA, and the APA. On appeal, this court rejected the jurisdictional claim, finding that neither the DJA nor the APA extended federal court jurisdiction "to cases not otherwise within their competence." 467 F.2d at 356.

West Penn asserts that the district court's holding and, presumably, *Getty* are inconsistent with the Supreme Court's opinion in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). *Abbott Laboratories,* appellant contends, clearly mandates district court jurisdiction under the APA to review the administrative action contested by West Penn's complaint. The above cited cases

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(for example, *Zimmerman, supra)* show that the APA does not constitute a jurisdiction grant[30] and hence we must affirm the district court's dismissal in this case. However, assuming, *arguendo,* that it did constitute such a jurisdictional grant, we would still be required to affirm such dismissal.

The APA provides, in certain instances, for judicial review of agency action. 5 U.S.C. §701(b)(1) defines "agency" as "each authority of the Government of the United States . . . ." The APA does not extend to state agencies. Thus, it could not afford the district court jurisdiction of West Penn's suit against Goddard, who is the Secretary of a Pennsylvania agency.

As to Train, the complaint set forth two requests for relief. First, it asked that the court render a declaratory judgment that West Penn was not violating the plan as a means of preventing Train from citing the utility for acting contrary to the plan. Second, it asked an injunction against enforcement of any notice of vio-

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30. *Getty* took *Abbott Laboratories* into account in deciding that the APA did not empower the district court to hear Getty's complaint. Since West Penn does not appear to have advanced any arguments that would not have been considered by the *Getty* court, we would, under normal principles of *stare decisis,* be reluctant to disregard a decision of our court which is closely analogous to the case before us. This reluctance is reinforced by the Supreme Court's favorable citation of *Getty* in *Train v. NRDC,* 43 U.S.L.W. 4467, 4476-77 (U.S., Apr. 16, 1975). We recognize, however, that some commentators have taken a more expansive view of the reviewability of administrative action under the APA than this court did in Getty. See, *e.g.* G. Vining, *Direct Review and the Doctrine of Ripeness in Administrative Law,* 69 Mich. L. Rev. 1443 (1971); L. Jaffe, *supra,* at 339-63, 372-76.

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lation. According to 42 U.S.C. §1857c-8(a)(1), the "Administrator shall notify" any "person in violation of the plan. . . ." Issuance of a violation notice is thus nondiscretionary. However the decision to enforce a violation notice is discretion under 42 U.S.C. §1857c-8(b).[31] The APA does not provide for review of any act "committed to agency discretion by law." 5 U.S.C. §701(a)(2). See *Commonwealth of Ky. ex rel. Hancock v. Ruckelshaus,* 497 F.2d 1172, 1177 (6th Cir. 1974). Thus the APA would not provide jurisdiction for the district court to issue the requested injunction. Jurisdiction to issue the requested declaratory judgment is similarly wanting under 5 U.S.C. §704, which subjects to judicial review only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." West Penn cites, and we have found, no statute which makes reviewable Train's issuance of a notice of violation. Under the statutory plan, the notice of violation is not "final agency action" since it may be followed by either (1) an order which "may" be issued 30 days after the notice, 42 U.S.C. §1857c-8(a)(1), but "shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation," 42 U.S.C. §1857c-8(a)(4), or (2) a civil suit under 42 U.S.C. §1857c-8(b), referred to above. The statutory scheme contemplates that the violation notice itself has neither an independent coercive effect nor "the force of

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31. "(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

"(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; . . . ."

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law." *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418 (1942). The notice bears no resemblance to the Food and Drug Administration regulations which were found reviewable in *Abbott Laboratories* and *Garner v. Toilet Goods Association,* 387 U.S. 167 (1967). The Court characterized the regulations challenged in *Abbott* and *Toilet Goods* as "formal," "definitive," "effective upon publication" and "self-executing." 387 U.S. at 151, 171. See also *Toilet Goods Association v. Gardner,* 387 U.S. 158, 162 (1967). By contrast, the only effect of a notice of violation is to make the recipient aware that the "definitive" regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures. Of course, the plan's emission standards themselves *are* analogous to the regulations reviewed in *Abbott Laboratories,* but those regulations are not challenged on this appeal. See Part I above.

For the foregoing reasons, we hold that the APA provides no ground for district court review of the issues raised in West Penn's complaint.

III. Jurisdiction and the Due Process Clause

West Penn avers that "[i]n dismissing the instant suit for lack of jurisdiction and denying a hearing on the merits of all the issues raised in the Amended Complaint, the learned District Court has interpreted the Clean Air Act and its [sic] decision in *Getty Oil* in a manner which deprives West Penn of its due process right to a hearing guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." Brief for Plaintiff-Appellant at 23.

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West Penn is not claiming that it *has* been denied due process by any action of the defendants. It argues, rather, that it will not receive constitutional due process elsewhere than in a federal court hearing held prior to any other proceedings which are available to resolve the differences between the utility and the defendants. Yet at least two avenues of relief are open to West Penn, besides the present suit.

West Penn has taken the initiative in pursuing one of these alternatives by appealing to the Pennsylvania DER Environmental Hearing Board. Since the Board's decision is appealable to the Pennsylvania courts, 71 Purdon's Pa. Stats. §1710.41, West Penn has taken the first step to state court settlement of its dispute with Goddard.[32]

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32. See note 11, *supra*. West Penn will receive an adjudicative hearing before the Board. The rules of procedure at the hearing, set forth in the Pennsylvania Administrative Agency Law, 71 Purdon's Pa. Stats. §§ 1710.1 *et seq.*, comply with due process requirements as set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

West Penn cites this court's decision in *Duquesne Light Co. v. EPA*, 481 F.2d 1, 9 (3d Cir. 1973), for the proposition that it would not be accorded due process if it were relegated to its remedies under Pennsylvania law. This assertion is rejected. In *Duquesne*, the parties had already received a hearing before the Board which the court determined, from an examination of the record, was inadequate. The decision in *Duquesne* in no way implies that such a hearing is per se inadequate. We also note that West Penn errs in stating it is in the same position as the parties in *Duquesne*. Those parties were in the Circuit Court by virtue of having brought a § 1857h-5 (b) (1) suit. 481 F.2d at 5. West Penn did not bring this suit under that section of the Clean Air Act.

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Consistent with Article VI of the Constitution, providing, *inter alia,* that the "Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ," the Supreme Court of the United States has operated under the assumption that the state judges who have sworn to uphold such Constitution will afford due process of law to the litigants before them. See *Huffman v. Pursue, Ltd.,* 43 U.S.L.W. 4379, 4385 (No. 73-296, U.S., Mar. 18, 1975); *cf. Johnson v. Mississippi,* 43 U.S.L.W. 4553, 4555 (No. 73-1531, U.S., May 12, 1975).[33] Also, in view of the strong state interest in maintaining the public health through abatement of air pollution, see 42 U.S.C. §1857c-4 (b) (1) and (2), and the broad discretion delegable to public officials in the application and enforcement of health laws, *cf. Zucht v. King,* 260 U.S. 174 (1922), we see no justification for federal court interference with the state court remedies available to the parties in this case. *Duke v. Texas,* 477 F.2d 244 (5th. Cir. 1973), *cert. denied,* 415 U.S. 978 (1974).

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33. In *Huffman v. Pursue, Ltd.,* 43 U.S.L.W. 4379, 4383, the Court used this language:

> "Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* [*v. Harris,* 401 U.S. 37 (1971)] militate against such a result." (Footnote omitted.)

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The second route to relief is opened by 42 U.S.C. §1857c-8(a) (4), see Part II above. At the time West Penn brought this action, it had received only a notice of violation from Train. After receiving the notice, West Penn had the opportunity both for informally negotiating its differences with Train[34] and for presenting its cause to a federal district court, should EPA take formal steps to enforce the regulations allegedly violated by West Penn.[35] Thus West Penn has future relief available to it in both the state and federal courts. Also, West Penn has not advanced any reason that due process requires one federal court suit—initiated by West Penn—but prohibits another federal court suit that might be initiated by EPA. It is difficult to postulate in advance that two federal court proceedings which are governed by the same rules of procedure would have

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34. The utility has availed itself of this opportunity. West Penn and the EPA conferred on several occasions during the pendency of the suit. After these conferences, EPA issued an administrative order requiring West Penn to adopt and implement a procedure for complying with the Pennsylvania emission standards. EPA gave West Penn the choice of switching to low sulfur oil or to install a scrubber by December 31, 1978. The original March 1, 1975, deadline for submission of a compliance plan was extended to May 1, 1975. Each of the final deadlines for reducing West Penn's emissions to meet the Pennsylvania standards was similarly extended for 60 days.

35. In *Getty,* the court noted that the plaintiff there would "be foreclosed from raising these objections in a civil and criminal proceeding for enforcement" because it had not pursued its exclusive remedy under § 1857h-5(b) (1). Since we have determined that West Penn's claims could not have been raised in a subsection (b) (1) proceeding, we conclude that West Penn is free to argue them in an enforcement proceeding.

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different results in terms of due process. See also *Getty, supra,* at 357; 42 U.S.C. §1857h-5(c).

West Penn's argument thus appears to misapprehend the nature of due process. Due process requires, essentially, only a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Goldberg v. Kelly,* 397 U.S. 254 (1970). A hearing which comports with due process[36] must ordinarily be accorded before a party can be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). See *Goldberg, supra; Mattern v. Weinberger,* No. 74-1776 (3d Cir. 1975). But see *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); *Richardson v. Perales,* 402 U.S. 389 (1971). The hearing, however, need not be in federal court. See *Arnett v. Kennedy,* 416 U.S. 134 (1974); *In-Cho Chung v. Park, et al.,* Nos. 74-1875, 74-1876 (3d Cir., Apr. 11, 1975). Thus a party is not deprived of due process who, having no federal cause of action, is relegated to the state courts for redress. See, *e.g., Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 632 (1875); *Huffman v. Pursue, Ltd., supra.* Nor is a party deprived of due process merely because it must seek administrative resolution of its claims before it has access to the courts. *Crowell v. Benson,* 285 U.S. 22 (1932); *Estep v. United States,* 327 U.S. 114 (1946); *Barnes v. Chatterton, et al.,* No. 74-

36. It is axiomatic that due process is protean, its actual form at any time being a function of the rights and interests at stake in a given proceeding. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 610 (1974). Thus we make no attempt to give a detailed description of a hearing which provides procedural due process.

1570 (3d Cir., May 6, 1975); *Getty, supra* at 356 *ff*. See also *Jaffee, supra* at 381-89.[37] Further since West Penn has not adduced, and we have not discovered, any other statutory basis than the APA for district court jurisdiction of this suit, this due process argument also appears to misunderstand the power of the federal courts.

In *Sheldon v. Sill,* 49 U.S. (8 How.) 440, 448-49 (1850), the Court described the jurisdiction of the federal courts as being limited, first by the constitutional definition of federal court powers and, second, by the congressional distribution of jurisdiction:[38]

> "It has been alleged that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

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37. Were the rule otherwise, no court could require a party to exhaust administrative remedies before suing in a judicial forum. Yet the doctrine of exhaustion is widely accepted. See, *e.g., Barnes, supra; Jaffe, supra* at 424 ff.; 3 K. Davis, Administrative Law, §§ 20.01 *et seq.* (1958 ed. and 1970 Supp.). Also, the Supreme Court has stated on several occasions that delegation of the power to entrust enforcement of statutory rights to an administrative process is not a violation of the constitutional right to a jury trial under the Seventh Amendment. See *Pernell v. Southall Realty,* 416 U.S. 363, 383 (1974), and cases there cited.

38. The concept of federal courts as exercising only limited, as opposed to general, jurisdiction was hardly original with *Sheldon.* See, *e.g., Marbury v. Madison,* 5 jurisdiction actually is has been the subject to active debate. See generally, P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Court and the Federal System, 314-24; 330-75 (1973).

"It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

"The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

"Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary."

The holding of *Sheldon,* reaffirmed countless times, requires a statutory basis for district court jurisdiction of West Penn's action. The mere invocation of "due process" cannot without more furnish such a basis in this suit.

Finally, even if we did discover a statutory grant of jurisdiction, the inapplicability of the APA would pose immunity barriers to this suit against Train, while the policy against federal court intervention in the state administrative process would prevent suit against Goddard. *Beale v. Blount,* 461 F.2d 1133, 1138 (5th Cir. 1972). See *Huffman, supra* at 4383-84; *Jaffe, supra* at 213-31, 327-29.

For the foregoing reasons, the June 19, 1974, district court order will be affirmed.[39] Costs will be taxed against appellant.

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39. We are not precluded from affirming the district court's order, even though we disagree with that court's determination that jurisdiction was lacking because 42 U.S.C. § 1857h-5(b)(1) provided West Penn's exclusive remedy. *Rhoads v. Ford Motor Co.,* No. 74-1626, slip op. at 5 (3d Cir., Apr. 30, 1975); *Tunnell v. Wiley,* No. 74-1245, at n.4 (3d Cir., Apr. 1, 1975); *Litwicki v. Pittsburgh Plate Glass Industries, Inc.,* 505 F.2d 189, 192 n.4 (3d Cir. 1974).

ADAMS, *Circuit Judge,* dissenting.

I respectfully dissent from the majority's decision because I believe that a notice by the federal Environmental Protection Agency that a firm is violating a federally approved air pollution regulation is, under the specific factual configuration here, judicially reviewable under the Administrative Procedure Act (APA).[1]

Pursuant to the Clean Air Act Amendments of 1970[2] the Administrator of the Environmental Protection Agency issued a national primary ambient air quality standard regulating the permissible concentration of sulfur oxides.[3] Under the Act, each state is required to develop and submit for approval by the Administrator an implementation plan designed to achieve the Administrator's air quality standards.[4] Once a state's plan has been ratified by the EPA, it becomes enforceable as a federal regulation.

After the Administrator approved the Pennsylvania plan, which included a provision intended to achieve compliance with the Administrator's limitation on the proportion of sulfur oxides in the ambient air, West

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1. 5 U.S.C. §§ 701 et seq. (1967).

2. Pub. L. 91-604, 84 Stat. 1676.

3. Under 42 U.S.C. § 1857c-4, the Administrator is directed to fix national primary and secondary ambient air quality standards for air pollutants detracting from the public health or welfare. *See* 42 U.S.C. § 1857c-3.

Primary ambient air quality standards are those necessary, in the Administrator's judgment, to protect national health. Secondary ambient air quality standards are those necessary, in the Administrator's judgment, to preserve the general welfare. *See* 42 U.S.C. § 1857c-4(b).

4. 42 U.S.C. § 1857c-5.

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Penn did not exercise its right to challenge the EPA's approval in the federal courts.[5] West Penn did, however, in accordance with the terms of the Pennsylvania plan, petition the Pennsylvania Department of Environmental Resources (DER) for a variance from the plan's sulfur oxide emission[6] restriction as it applied to the company's Boiler No. 33 at its Mitchell Power Station.

On September 13, 1973, before DER had acted on West Penn's request for a variance, West Penn received from EPA a notice that Boiler No. 33 was in violation of the federally approved Pennsylvania implementation plan. Subsequently, on September 19, 1973, DER granted West Penn a temporary variance from the sulfur oxide emission restriction, conditioned upon West Penn's proceeding with the installation of a flue gas desulfurization device, referred to as a "scrubber." The EPA has not approved this variance from the Pennsylvania plan.[7]

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5. 42 U.S.C. § 1857h-5(b)(1) permits a party aggrieved by the Administrator's approval of any implementation plan to seek review in the court of appeals for the appropriate circuit within 30 days of the Administrator's action.

6. Although West Penn Power sought variances from several of the plan's emission limitations, only the sulfur oxide restriction is relevant to this appeal.

7. A variance from an EPA accepted state implementation plan must be approved by the EPA before the polluter is sheltered from federal enforcement of the emission limitations contained in the implementation plan. 42 U.S.C. §§1857c-8; 1857c-5(d); 1857c-5(a)(3). For a discussion of the procedure for obtaining EPA approval of such a variance, see Train v. Natural Resources Defense Council, 43 U.S.L.W. 4467 (U.S., Apr. 16, 1975). West Penn did not ask the district court to compel the Administrator to approve the variance, and we need not therefore decide whether such a remedy would be available to the company.

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West Penn, dissatisfied with the state's conditioning the variance upon the installation of a scrubber, appealed the DER's order to the Pennsylvania Environmental Hearing Board.[8]

West Penn then sued[9] the Administrator of the EPA, the DER, and the Secretary of the DER. The company requested a declaratory judgment that West Penn was not in violation of the Pennsylvania implementation plan and that the defendants had no right to reject West Penn's proposal for achieving compliance by use of a tall stack.[10] The firm also asked for preliminary and permanent injunctions barring the Administrator from proceeding to enforce the September 13, 1973 notice of violation and preventing DER and its Secretary from enforcing their order, in response to West Penn's variance application, directing the utility to install a scrubber.

The district court granted motions to dismiss with respect to all the defendants. The trial judge concluded that the action against DER was barred by the Eleventh Amendment. As to the Secretary, the court held that, although the Eleventh Amendment did not prohibit the

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8. *See* 35 Pa. Stat. Ann. §§ 4004(4.1), 4013.5 and 71 Pa. Stat. Ann. § 1710.41.

9. West Penn's original complaint did not name the Secretary as a defendant.

10. The primary and secondary ambient air quality standards issued by the Administrator define maximum permissible concentrations of sulfur oxides in the atmosphere. A scrubber is intended to achieve these standards by removing the pollutants from exhaust gases before they are discharged. In contrast, tall stacks are designed to reduce the atmospheric concentrations by dispersing the compounds over a wider area.

suit, the district court had no jurisdiction because, insofar as the suit was a challenge to the Pennsylvania implementation plan, it was barred by 42 U.S.C. § 1857h-5 (b) (2).[11] In any event, the trial judge held that he had no authority to interfere with the exercise of discretion by the Secretary of DER in issuing variances for EPA approval.[12] As detailed more fully in the majority opinion, the district court, relying in large measure on 42 U.S.C. § 1857h-5(b) (2) and *Getty Oil,*[13] also rejected all the proffered bases for its jurisdiction to hear the suit against the Administrator.

The majority discerns that one of the arguments pressed by West Penn is that, aside from any variance, a tall stack strategy is a permissible method of complying with the implementation plan, and therefore West Penn is not contravening the plan. The majority states that this contention does not constitute a justiciable issue between West Penn and the Administrator under the

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11. 42 U.S.C. § 1857h-5 provides, in relevant part:
(b) (1) . . . A petition for review of the Administrator's action in approving . . . any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such . . . approval . . . , or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

12. West Penn did not appeal the dismissal of DER. The majority affirms the dismissal as to the Secretary.

13. Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973).

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APA, first, because the issuance of a notice of violation by the EPA is not "final agency action," and second, because the Administrator is invested with substantial discretion in determining whether compliance procedures should be initiated. I disagree.[14]

The APA is to be liberally construed in favor of affording judicial review of administrative actions. In the words of Justice Harlan in the landmark case of Abbott Laboratories v. Gardner, the " 'generous review provisions' [of the APA] must be given a 'hospital interpretation' "[15] Judicial supervision of agency conduct is not precluded "unless there is persuasive reason to believe that such was the purpose of Congress."[16] The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' "[17] As this Court recently declared, albeit in the context of a case in which we found an express Congressional prohibition against judicial review of the agency action in question:

> Federal agencies should not be able to retreat behind the concept of no judicial review unless Congress has specifically authorized such a bar.[17a]

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14. Of course, I express no opinion on the merits of West Penn's claim that tall stacks are sufficient, an issue which was not addressed by the district court and which the parties have not briefed or argued here.

15. 387 U.S. 136, 140-41 (1967).

16. *Id. See Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955); Rusk v. Cort, 369 U.S. 367 (1962).

17. 387 U.S. at 140.

17a. Pollard v. Romney, 512 F.2d 295, 298 (3d Cir. 1975).

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SECTION 1857h-5(b)(2) DOES NOT BAR WEST PENN'S SUIT

As the majority states, this Court's interpretation in *Getty Oil* of 42 U.S.C. § 1857h-5(b)(2) does not impede West Penn's attempt to have the trial court decide whether the company has fulfilled its responsibilities under the Pennsylvania plan. Instead of seeking judicial review of the EPA's approbation of the Delaware implementation plan, Getty asked the state for a variance delaying the effective date of the plan's restriction of the sulfur content of fuels burned in a particular region of the state. The state administrative agencies denied the variance, but the state courts temporarily restrained Delaware from enforcing the restriction. While the state was so restrained, however, the EPA demanded compliance. Getty asked this Court to set aside EPA's order on the grounds that primary air quality standards had already been reached and that compliance, prior to the development of alternative technology, would impose an unreasonable economic burden. The panel held that we could not in the procedural posture of that case entertain economic or technological objections to the plan.

Getty interpreted section 1857h-5(b)(2) to foreclose later judicial inquiry with respect to issues which could have been raised before a court of appeals in a suit challenging federal approval of a state implementation plan within 30 days after such approval. West Penn's contention that it has acted in conformity with the plan, however, unlike Getty's argument, does not take exception to the validity of the plan. At least with respect to this issue, West Penn in essence concedes the legitimacy of the Pennsylvania plan and asserts that the company has obeyed it. This issue could not have been raised in a

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suit contesting EPA's approval of the plan. Thus section 1857h-5(b)(2) does not furnish "clear and convincing evidence," or indeed any evidence, that Congress intended to prevent judicial review of the question whether West Penn may comply with the Pennsylvania plan by constructing a tall stack.

THE SEPTEMBER 13, 1973 NOTICE OF VIOLATION ISSUED BY EPA REPRESENTS FINAL AGENCY ACTION.

In order to assess whether the notice of violation constitutes "final" agency action "committed by law to agency discretion" within the meaning of the APA[18]—a characterization of the EPA's role made by the majority in sustaining the district court—it is necessary to outline the statutory enforcement procedures under the Clean Air Act. Whenever the EPA learns that any person is in violation of a federally-sanctioned implementation plan, the Administrator "shall notify the person in violation of the plan and the State in which the plan applies of such finding."[19] If the failure to conform to the plan continues beyond 30 days from the date of the notice of violation, the Administrator may commence a

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18. 5 U.S.C. §701(a) provides in pertinent part:

This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review.

(2) agency action is committed to agency discretion by law.

5 U.S.C. §704 provides in part:

[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.

19. 42 U.S.C. § 1857c-8(a)(1).

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civil enforcement action in the district court or "may issue an order requiring such person to comply" with the plan.[20] Any such order "shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.[21] Whether or not any enforcement suit has been filed or any compliance order issued, however,

> [a]ny person who knowingly violates any requirement of an applicable implementation plan . . . more than 30 days after having been notified by the Administrator . . . shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both."[22]

The penalties for failure to obey a compliance order are the same as those for failure to abate pollution within 30 days of a notice of violation.[23] If a conviction under this section is not the offender's first, the penalties are doubled.[24]

Determination of the "finality" of agency action under the APA must be viewed pragmatically. In *Frozen Food Express v. United States,* for example, the ICC had issued an order stating that specified goods did not qualify for the "agricultural commodities" exemption from the statutory requirement that motor carriers possess a permit or certificate. The Supreme Court ruled that this was a final order. Although the decree under

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20. *Id.*
21. 42 U.S.C. § 1857c-8(a)(4).
22. 42 U.S.C. § 1857c-8(c)(1).
23. *Id.*
24. *Id.*

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attack did not directly command the plaintiff carrier to do or not to do any particular act, the Court considered the order final and justiciable because it had "an immediate and practical impact" on motor carriers and shippers:

> The determination made by the Commission is not therefore abstract, theoretical, or academic. . . . The "order" of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. . . . Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks.[25]

As I have previously observed, the triad of Supreme Court decisions in *Frozen Foods, Storer Broadcasting*[26] and *CBS*[27] has an overarching importance which reaches beyond the particular facts involved there. In view of the continuing significance afforded to those decisions by the courts, the principles adopted in them constitute a "rule" of federal administrative law which favors review where the impact of agency action is, as in this case, concrete and immediate.[28]

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25. 351 U.S. 40, 43-44 (1956). See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Abbott Laboratories, 387 U.S. at 149-51.

26. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

27. Columbia Broadcasting v. United States, 316 U.S. 407 (1942).

28. PBW Stock Exchange v. Securities and Exchange Comm'n, 485 F.2d 718, 741 (3d Cir. 1973) dissenting opinion), *cert denied* 416 U.S. 969 (1974).

Here, further proceedings within the agency are not necessary before the Administrator's decision is enforceable against West Penn.[29] The notice of violation, independent of any further proceedings thus has a coercive effect upon the utility. Continuation of West Penn's present compliance strategy beyond 30 days from the date of the notice would render the company subject to the possibility of a $25,000 fine for each day of continued violation and would impose on the corporate officers the risk of imprisonment if the EPA's interpretation of the implementation plan is eventually adjudicated correct.

On the other hand, compliance with the plan as construed by the Administrator would require the immediate commencement of the installation of a multimillion dollar scrubber device[30] or the prompt shutdown of the power plant. The choice faced by West Penn is analogous to that of the drug companies in *Abbott Laboratories;* if the drug manufacturers wished to conform to the agency's labeling requirements,

> [T]hey must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance . . . would risk serious criminal and civil penalties. . . .[31]

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29. See 42 U.S.C. § 1857c-8(c)(1).

30. West Penn represented to the district court that installation of a scrubber at the plant in question would require an expenditure in excess of $23 million and that operation of the equipment would increase operating costs by $6.5 million annually. The Administrator has not disputed the order of magnitude of these figures.

31. 387 U.S. at 151-53.

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Thus the notice of violation here, like the regulation in *Abbott,* is final agency action because it impels the company to accede to the dictates of the Administrator.[32]

Also, the notice of violation here is reviewable as final action because judicial resolution of the question whether West Penn's proposed mode of pollution control is interdicted by the state plan would not unduly disrupt the systematic processing of the case within the EPA.

> [T]he relevant considerations in determining finality are whether the process of administrative decision-making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined.[33]

The notice that West Penn has failed to adapt to the Pennsylvania plan represents the Administrator's definitive interpretation of the plan. His conclusion was not merely tentative. Nor did the company's complaint present to the district court an abstract question or a hypothetical situation. No further administrative proceedings were necessary before a suit could be commenced by the EPA compelling compliance with the plan and extracting the statutory penalty. Although the Administrator may decide when enforcement measures should be taken and whether the agency should issue a compliance order[34]

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32. *See also* National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 698 (D.C. Cir. 1971).

33. Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 70-71 (1970).

34. A compliance order was issued to West Penn on February 18, 1975, subsequent to the decision by the district court.

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or go directly to the district court, those determinations ordinarily will not include a re-interpretation by the Administrator of the implementation plan. Thus there were no on-going administrative functions which could be disrupted by judicial review as requested by West Penn.

REVIEW SHOULD NOT BE DENIED HERE BECAUSE OF THE POSSIBILITY OF ENFORCEMENT PROCEEDINGS IN THE FUTURE

As discussed earlier, since the issue of its compliance with the plan could not have been adjudicated in an action taking exception to federal approval of the plan, West Penn would be free to assert in any litigation brought to compel obedience to the plan or to a compliance order—as well as in any suit to impose a penalty—that it has already conformed to the plan by installing a tall stack. The possibility of a subsequent enforcement proceeding, however, does not generally prevent review of agency action at the request of an aggrieved party where, as here, that party may reasonably be intimidated into acquiescing in the administrative ruling before he can obtain a hearing at the enforcement stage.[35]

Under the statutory scheme here the Administrator may indefinitely delay invoking the power of the district courts so as to force West Penn into what the EPA considers compliance with the plan. Yet for each day of violation beyond an initial 30 day period West Penn would possibly incur a substantial fine. Thus, because of the potential liability if its good-faith interpretation of the plan is incorrect, West Penn may not be able, as a practical matter, to defy the EPA for any prolonged

35. *See Abbott Laboratories*, 387 U.S. 136; United States v. Storer Broadcasting, 351 U.S. 192 (1956).

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period. Therefore, whether or not due process is satisfied by the enforcement action, that proceeding, the timing of which is entirely within the control of the agency, provides an inadequate forum under the APA for adjudicating the rights of the utility.

The state legislation before the Supreme Court in the historic case of Ex Parte Young possessed a similar *in terrorem* effect.[36] That case, of course, arose long before the enactment of the APA and in any event involved state rather than federal administrative actions. The Court's description of the impact of the legislation, however, may be instructive here. The railroads in *Young* sought an adjudication that the rates set by the state regulatory commission were so low as to be confiscatory. State law imposed a fine of up to $5,000 as well as imprisonment for each transaction in which the rate charged exceeded the regulated rate. The Court stated, "The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company."[37]

ENFORCEMENT OF THE PENNSYLVANIA IMPLEMENTATION PLAN IS NOT ACTION "COMMITTED TO AGENCY DISCRETION BY LAW" SO AS TO PRECLUDE JUDICIAL REVIEW

Judicial consideration of West Penn's assertion that its tall-stack strategy is in harmony with the state plan is not forestalled by the fact that Congress has left to the

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36. 209 U.S. 123 (1908).

37. *Id.* at 146.

Administrator the tactical decisions when and by what method the EPA can most effectively execute the implementation plans. Although the APA provides an exception to the regime of judicial supervision in those cases where "agency action is committed to agency discretion by law,"[38] that exception is applicable only in those discreet and infrequent situations where Congress explicitly expressed an intent that the judgment of the executive branch be wholly unfettered. The Supreme Court has explained that this is "a very narrow exception. . . . [I]t is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[39]

Although some aspects of a given decision may be committed entirely to the policy judgment of an expert administrator, where legal standards are implicated the courts are available to persons aggrieved by the decision in order to assure that the agency adhered to the proper standards in carrying out its duty.[40]

> An "all or nothing" approach to reviewability would, in specific cases, either be unfair to persons aggrieved by agency action, or imposed an unwise burden upon the agency or the courts. Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the

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38. 5 U.S.C. § 701(a)(2).

39. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

40. East Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524, 534 (9th Cir. 1972); Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Cappadora v. Celebrezze, 356 F.2d 15 (2d Cir. 1966).

agency action may be committed to the agency's expertise and discretion.[41]

In the case at hand, the question whether tall stacks meet air purity requirements of the applicable implementation plan is a legal issue wholly divorced from the Administrator's exercise of discretion in concluding at what time and in what manner the plan should be enforced in order to maximize the public benefit. A resolution now by the district court of the issue raised by West Penn would be confined to an interpretation of the plan and need not in any way interfere with the proper and expeditious functioning of the EPA.

CONCLUSION.

Since the APA embodies a presumption of federal review, since the issuance of a notice of violation in this context has an immediate and grave impact on the alleged polluter, since adjudication of a claim that the alleged polluter is obeying the applicable implementation plan would not interfere with the discretionary functions entrusted to the Administrator, and since no other effective judicial review is available. I would hold that the APA furnishes a basis upon which an alleged polluter may obtain a forum for prompt resolution of his claim that he has accommodated his conduct to the implementation plan.

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41. East Oakland-Fruitvale Planning Council, 471 F.2d at 533. See, e.g., Dunlop v. Bachowski, 43 U.S.L.W. 4669 (U.S., June 2, 1975); Campaign Clean Water, Inc. v. Train, 489 F.2d 492, 498 (4th Cir. 1973); Parker v. United States, 448 F.2d 793, 797-98 (10th Cir. 1971); Reddy, Inc. v. Dept. of Labor, 492 F.2d 538, 544 (5th Cir. 1974).

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There is a strong public interest in the expeditious resolution of this type of dispute. If West Penn is relegated to reliance on some distant enforcement hearing, the threat of a $25,000-a-day penalty may impel the company to undergo an unnecessary expense of millions of dollars, which will have to be borne either by the firm's shareholders or, more likely, its ratepayers. On the other hand, if the Administrator's interpretation of the plan is correct, in the absence of a hearing, West Penn may in good faith continue to imperil the public health and welfare by exceeding the permissible concentration of pollutants. Accordingly, I would remand the cause to the district court for consideration whether the proposed tall stack fulfills the requirements of the plan.[42]

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42. Since the majority reaches the merits of the applicability of the APA to this dispute, I assume, without deciding, that if the APA is not itself jurisdictional in nature, Zimmerman v. United States, 422 F.2d 326, 330-31 (3d Cir. 1970), jurisdiction would be under one of the general grants of jurisdiction, such as 28 U.S.C. §1337. *See* Dunlop v. Bachowski, 43 U.S.L.W. 4669, 4671 (U.S., June 2, 1975); Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974). Although the district court rejected § 1337 as a basis for jurisdiction, it did so apparently in reliance on section 1857h-5(b)(2). The majority's statement, at fn. 26, that West Penn does not appeal that ruling by the trial judge appears to take an unnecessarily restrictive view of West Penn's contentions.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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Order Amending Slip Opinion.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-2050

WEST PENN POWER COMPANY, a corporation,
Appellant

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania

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(D.C. Civil No. 73-1083)

Present: VAN DUSEN, ADAMS and GARTH, *Circuit Judges*

ORDER AMENDING SLIP OPINION

It is ORDERED that note 27 of the slip opinion of the majority, filed July 16, 1975, in the above matter is deleted, and former notes 28 to 39 are renumbered 27 to 38, respectively.

By THE COURT:

VAN DUSEN
Circuit Judge

Dated: August 15, 1975

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APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WEST PENN POWER COMPANY v. RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources	Civil Action No. 73-1083

Opinion

KNOX, District Judge

West Penn Power Company, a Pennsylvania public utility, has filed suit in this district court asking for an injunction against defendant Train, Administrator of the Environmental Protection Agency of the United States (hereinafter referred to as the Federal Administrator) and Maurice K. Goddard, individually and as Secretary of the Department of Environmental Resources, and the Department of Environmental Resources of the Commonwealth of Pennsylvania (hereinafter collectively referred to as the State defendants). The suit seeks an injunction against enforcement of a notice of violation issued by the Federal Administrator requiring plaintiff to install a sulphur emission control device on Boiler No. 33 at its Mitchell Power Station, a

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"fossil-fired" electric generating facility in Washington County, Pennsylvania and also seeks a declaratory judgment that it is not in violation of the Pennsylvania Plan for control and abatement of air pollution as approved by the Federal Administrator. Particularly, it is complained that the defendants are acting without authority of law in rejecting plaintiff's Plan for compliance with national standards controlling sulphur oxides by the use of a tall stack instead of sulphur emission control devices on the boiler.

Plaintiff avers that there are presently no sulphur emission control devices available for use on this boiler to enable it to comply with the regulations and that if it is required to install such devices, its generating capacity will be greatly reduced and its supply of electric power to its customers will be impaired. It is further averred that to install such devices will result in an expenditure in excess of $23,000,000 and annual costs of $6,500,000 which will require considerable increases in rates to its customers.

The federal legislation is lengthy and complicated with respect to air pollution. The air pollution control provisions are embodied in 42 U.S.C. 1857, et seq. with numerous amendments. This legislation provides a comprehensive scheme for the control of air pollution throughout the United States. In 1857(c)(5) Section 110) provision is made for filing of state implementation plans to conform with national air quality standards as promulgated by the Federal Administrator. A plan is to be adopted by each state and submitted to the Administrator within a limited period of time for approval. Provision is made for action by the Administrator in promulgating a plan where the state does not act.

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The complaint is not clear as to exactly when the Pennsylvania plan for implementation of the national ambient air quality standards for Pennsylvania was approved by the federal agency, but it does appear that such approval was prior to September 15, 1972, because in paragraph 9 of the complaint, it is averred that the plaintiff on that date petitioned for a variance from the limitations contained in the Pennsylvania plan which petition for variance was amended June 7, 1973.

The amended complaint (which, inter alia, added defendant Goddard as a defendant in addition to the original defendant the Department of Environmental Resources of the Commonwealth of Pennsylvania) avers that on September 13, 1973, the Federal Regional Administrator notified the plaintiff that its power station was in violation of the Pennsylvania Plan. On September 19, 1973, it is averred that the state defendants rejected a variance for use of a tall stack on the boiler in question but postponed compliance until June 30, 1976, when they directed plaintiff to install a sulphur emission control device on the boiler in question which order of the state defendants plaintiff avers has been appealed "to the appropriate administrative body".

The plaintiff avers that the Federal Administrator has exceeded his authority in interpreting the federal Act to prohibit the use of a tall stack as a method for attainment of air quality standards and as a result of this intepretation by the Federal Administrator, the state defendants have failed to promulgate regulations permitting the use of a tall stack as a part of the Pennsylvania plan. It is therefore claimed that the federal defendant has breached his non-discretionary duties under Sections 108 and 110 of the Act (42 U.S.C. 1857c—3 and 5).

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The Pennsylvania legislation under which the state defendants and proceeding is found in 35 Purdon's Pa Stats 4001, et seq. It provides as pointed out by the plaintiffs for fines up to $1,000 per day, conviction after further proceedings for a misdemeanor, and civil penalties of $10,000 plus $2,500 for each day. This would appear enough to constitute irreparable harm for a preliminary injunction if the plaintiff was in the proper judicial forum.

A. Suit Against The Federal Defendants.

Insofar as the federal defendants are concerned, plaintiff asks relief for a decree declaring that neither defendants have a right to reject plaintiff's plan for compliance, that the decree be entered declaring that plaintiff is not in violation of the Pennsylvania plan as approved by the Administrator and for a preliminary injunction enjoining the Federal Administrator from proceeding to enforce the notice of violation issued on September 13, 1973.[1]

Jurisdiction to bring this suit against the Federal Administrator is allegedly founded upon 5 U.S.C. 701,

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1. "2. Pursuant to its authority under the Pennsylvania Public Utility Law, 66 P.S. 1101 et seq, Plaintiff operates the Mitchell Power Station, a fossil-fired electric generating facility in Washington County, Pennsylvania.

3. Defendant, Russell Train, is the Administrator of the Environmental Protection Agency of the United States of America ("Administrator" herein) charged with the responsibility under the Clean Air Act, 42 U.S.C. 1857 et seq of approving or disapproving plans of the States for the implementation of national ambient air quality standards and, in cooperation with the States, of the enforcement of plans approved by the Administrator for the implementation of national ambient air quality standards.

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et seq (Administrative Procedure Act), the Federal Declaratory Judgement Act (28 U.S.C. 2201 and 2202, together with the jurisdictional grant contained in 28 U.S.C. 1337) and also upon portions of the Clean Air Act, specifically 42 U.S.C. 1857h—2.

Insofar as the Administrative Procedure Act and Declaratory Judgment Act are concerned, our Circuit has spoken very clearly in Getty Oil Co. v. Ruckelshaus, 467 F 2d 349 (3d cir 1972) stating (page 356) "The Declaratory Judgment Act and APA could not afford a basis for jurisdiction."

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4. Defendant, Department of Environmental Resources of the Commonwealth of Pennsylvania ("Department" herein) is an administrative agency of the Commonwealth of Pennsylvania authorized by the Pennsylvania Air Pollution Control Act, 35 P.S. 4000 et seq. to prepare and develop a comprehensive plan for the control and abatement of air pollution in the Commonwealth of Pennsylvania.

* * *

6. This Court's jurisdiction is based upon the Clean Air Act, 42 U.S.C. 1857 et seq, specifically 42 U.S.C. 1857h-2; the Administrative Procedure Act, 5 U.S.C. 701 et seq; The Federal Declaratory Judgment Act, 28 U.S.C. 2201 and 2202 and 28 U.S.C. 1337.

7. The Clean Air Act, 42 U.S.C. 1587 et seq is an Act of Congress regulating commerce.

8. On information and belief plaintiff avers that the Administrator of the Environmental Protection Agency has approved the plan submitted to it by defendant Department for the implementation of national ambient air quality standards in the Commonwealth of Pennsylvania. The plan approved by the defendant Administrator included the rules and regulations of the defendant Department with respect to the attainment of national primary ambient air quality standards for particulate matter and sulfur oxides as well as rules and regulations with respect to variances from emission standards for particulate matter and sulfur oxides."

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Referring to 42 U.S.C. 1857h—2 (Section 304 of the Act) it appears that plaintiff's claim for judisdiction is based upon this language.

> *"Citizen suits—Establishment of right to bring suit*
>
> (a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be."

1857h—2(b) provides as follows:

> "No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . ."

It appears from the complaint and the admissions of the parties that no such notice was given prior to the institution of this suit. We agree with the defendant that the Congress can specify in legislation terms upon which

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the government consents to be sued and such terms must be strictly followed. Hence, the court has no jurisdiction of this suit under that Section. Entirely aside from the notice provisions, we hold that this court has no jurisdiction under this Section for the reason that this covers only cases where the Administrator is being sued for failure to perform a non-discretionary duty. Here the plaintiff is attacking the Administrator's action in approving the Pennsylvania plan, and including therein a provision which prevents plaintiff from using the so-called tall stack as a method of compliance with the ambient air standards. A reference to 42 U.S.C. 1857c—5 (Section 110) shows that the Administrator has ample discretion in determining approval of state plans and hence it is the holding of this court that no suit will lie under 1857h—2.

The real obstacle in plaintiff's path, however, is 42 U.S.C. 1857h—5(b) (Section 307) wherein it is provided:

> "(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1(b)(1) of this title), any determination under section 1857f—1(b)(5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving*

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or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

Admittedly the plaintiff chose not to file an appeal with the Court of Appeals for the Third Circuit, which appears to be the appropriate court, within 30 days and comes in now at this late date (suit was filed December 20, 1973) well over a year later in an attempt to secure injunctions and declaratory judgments in this district court against the actions of the Administrator.

Again, our Circuit in Getty Oil, supra, has spoken very clearly on this matter:

". . . Getty was in the wrong court by virtue of section 307 of the Act. *The Declaratory Judgment Act and APA could not afford a basis for jurisdiction.* Getty's arguments against enforcement require a determination by the court whether the regulation is unnecessary, unreasonable or capricious. Whether Getty abides in the regulation 'in its general application' is immaterial. *If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word*

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'exclusive' in the statute providing for a forum for judicial review. UMC Industries, Inc. v. Seaborg, 439 F 2d 953 (9th cir 1971). The Declaratory Judgment Act and the APA do not extend jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence." The court further said:

"No appeal was taken from the Administrator's approval of the implementation plan to the court of appeals as provided by the Clean Air Act. Instead, Getty chose to seek a restraining order in the Chancery Court of Delaware in December of 1971."

Getty thereafter brought a suit in the United States District Court for the District of Delaware and the Court of Appeals held that the plaintiff company was attempting an end run around the act by seeking pre-enforcement judicial review. The court held that there was no jurisdiction in the district court and remanded the case with directions to the district court to enter an order of dismissal for lack of jurisdiction. The court further said:

"The Administrator has a responsibility to see that a state plan will meet the national standards. Because of that responsibility, he has a vital interest in determining whether a particular deferral will have the effect of preventing attainment or maintenance of the national standard. However, until the criteria of 40 CFR 51.32(a) through (f) are met, the Administrator is duty bound to enforce an approved implementation plan.

"Getty's protestations of good faith attempts to bind suitable technology which would enable it to comply do not affect the Administrator's duty of

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enforcement. Likewise, the conditions established for postponement of compliance with 42 U.S.C. 1857c-5(f)(1) are not available to Getty in any event."

We agree that the granting of the variance by the state authorities extending time for compliance to June 30, 1976, amounts to a modification of the Pennsylvania plan and in such case to stay the hand of the federal government there must be an application by the governor of Pennsylvania under 42 U.S.C. 1857c—5 and 6.

We have further enlightenment on the problems before us in the case of Duquesne Light Co. v. Environmental Protection Agency, 481 F 2d 1 (3d cir 1973). In that case, involving clarification of a previously entered remand order by the circuit on petition for review timely filed, the court said:

> "Review by federal courts of actions taken by the Administrator is circumscribed by section 307 (b)(1). It provides that petitions for review of the Administrator's actions approving implementation plans are to be filed in the United States Court of Appeals for the appropriate Circuit, within thirty days of the date of the Administrator's approval. Subsection (2) of 307(b) forecloses later litigation in enforcement proceedings of issues for which review could have been had under section 307(b)(1)."

The court further pointed up the so-called "Getty Oil dilemma" which also exists in the instant case, namely that even though a variance has been obtained from state authorities, the Federal Administrator is nevertheless bound to enforce the original plan at least

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until proper application is made by the governor as hereinbefore mentioned. The court said:

"A. *The Getty Oil Dilemma*

At oral argument, the EPA asserted that redress through the state administrative process was the proper course for Duquesne and St. Joe to pursue. The companies applied for variances permitting deviation from the plan's requirements. Petitions seeking variances have, according to counsel, been filed with the appropriate state authority and are wending their way through the state administrative process. Presumably, the final state administrative determination will be subject to judicial review, pursuant to the Pennsylvania Administrative Agency Law, 71 PS 1710.41. Such recourse to the state procedure for correction of alleged imprefections in the Pennsylvania Implementation Plan is the path advocated by the EPA, but an undoubtedly time-consuming course of action. However, it does appear to serve the bi-level design of section 110 of the Clean Air Act."

The court further said:

"Thus Getty found itself in a difficult position. It was liable to federal sanctions, imposed because Getty was violating a state regulation adopted by the Federal Government, but in effect, repudiated by the state. The present case presents the Court with the specter of a recurrence of the Getty paradox. Here the plan has been adopted by, and is enforceable by, the EPA during the time state proceedings that might alter the plan are underway. A proper decision of this case requires a resolution

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of this predicament. However, such resolution will be considered in the concluding section of this opinion."

The court concluded as follows:

"The Court finds that to expose the companies to the risk of punishment without affording them full occasion to express their objections to the state implementation plan is fundamentally unfair. Therefore, this court instructs the EPA that it must either (a) refrain from imposing any penalties on these companies during the pendency of their state administrative and judicial actions, so long as such actions are pursued by the companies in good faith and with due diligence or (b) afford the companies a limited legislative hearing."

As noted, it appears the plaintiff finds itself in the "Getty Oil Dilemma". But if so this is to a considerable extent its own doing in not filing a petition for review with the circuit at the proper time. The circuit having a case properly before it could very well direct the administrator to refrain from enforcement procedures while the variance application was still pending before the state authorities but this court certainly would have no power to enter such a direction to the administrator when we determine as we do that we have no jurisdiction of this case at all. For this reason, the motions to dismiss filed by the Federal Administrator must be granted.

B. THE STATE DEFENDANTS.

Turning to the state defendants, we likewise find that we are without jurisdiction in this matter. The state defendants have raised numerous questions with respect to the jurisdiction of this court over the Depart-

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ment of Environmental Resources of the Commonwealth of Pennsylvania and likewise over Maurice K. Goddard who was sued individually and as secretary of this department to eliminate the argument that the suit was actually against the State of Pennsylvania and hence in violation of the Eleventh Amendment. The suit as stated was originally brought only against the State Department and the state defendants very properly raised the question that the suit could not stand under the Eleventh Amendment. This was so held by the United States Supreme Court in Employees of the Department of Public Health and Welfare State of Missouri v. Department of Public Health and Welfare of Missouri, 411 US 279, 36 L ed 2d 251, 93 S Ct 1614 (1973). It will be noted, however, that *Employees* involved payment of money out of the public treasury of the State of Missouri. The instant case involves no such payment. Instead this suit for declaratory and injunctive relief only would appear to be properly brought against Goddard as an individual and as Secretary under the exposition of principles contained in Edelman v. Jordan, US , 39 L ed 2d 662 (United States Supreme Court Slip Opinion 72-1410, March 25, 1974) in which case it was held that a suit such as this would lie under the decision in Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441 (1908) even though there might be some effect upon the state revenues since the state officials were enjoined from enforcing monetary penalties against the offending party.

However this may be, we hold that we have no jurisdiction to order relief against the state officials by compelling them to promulgate variances as sought by the plaintiff herein and in refraining from enforcing the Pennsylvania plan which it is asserted was approved without proper authority by the Federal Administrator.

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Such determinations can only be made on a petition for review by our court of appeals and since such review was not sought at the appropriate time, the only other remedy is to secure a complete variance and resulting modification of the plan through state proceedings and application by the governor under 42 U.S.C. 1857c—5 and 6 as heretofore discussed.

It does appear that a variance was sought from the state authorities and the plaintiff states its position as follows:

> "On September 19, 1973, the Department granted plaintiff a variance from its sulfur emission standards until June 30, 1976, rejecting however plaintiff's proposal for the use of a tall stack on Boiler No. 33 and directing it to install a sulfur emission control device. The action in the Department was appealed to the environmental hearing board—
>
> "Despite the Department's grant of a variance until June 30, 1976, the Governor of Pennsylvania to date has not made application under Section 110f-1 of the Clean Air Act, 42 U.S.C. 1857c-5(f) for a one-year extension of the mid-1975 compliance dates of the Pennsylvania Implementation Plan. Nor to plaintiff's knowledge has any revision of that plan been submitted for approval of the Administrator under section 110a-3 of the Clean Air Act, 42 U.S.C. 1857c-5(a)(3)."

Again, we are dealing with discretionary powers of state officials. Any state policy relying upon dispersion techniques rather than the emission limitations has been held to violate the Congressional policy with respect to clean air. See Natural Resources Defense Counsel, Inc.,

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v. Environmental Protection Agency, 489 F 2d 390 (5th cir 1974) in which case it was pointed out (page 401):

> "Section 1857c-5(f) is the device Congress chose to insure this. Congress aimed to make variances, postponements or whatever departures from earlier commitments might be called unusal and difficult to obtain. That is why Congress required applications for them to be made by the Governors of the states thus insuring an initial screening of applications by high level state officials. And that is why Congress imposed rigorous substitute conditions on the granting of variances allowing them only when the unavailability of technology made compliance impossible when continued operation of the source was essential to national security, public health or public welfare and when all available alternative control measures had been taken."

The administrative authorities both state and federal should take into consideration these matters in connection with the current national energy crisis which may indicate wider use of certain types of coal fuels resulting in larger sulfur oxide emissions than heretofore considered proper with, of course, all possible devices to prevent further deterioration of the environment. That, however, is not a matter for this court but for the administrative agencies charged with enforcement of these statutes and also for Congress to consider.

It would obviously be futile for this court to restrain the state authorities from enforcing these statutes in compliance with a plan which Pennsylvania has submitted and had approved by the federal authorities, and this court certainly has no means or requiring the Governor of Pennsylvania to submit an application for

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amendment of the plan as heretofore approved since, as pointed out by the Fifth Circuit, it was intended that such variations be difficult and be entirely reposed in the governor's discretion as to whether action was proper under circumstances existing.

It appears that plaintiff's complaint is not that state agencies have not granted them a postponement. Rather, they complain that the state agency should have granted them a complete variance and permitted a tall stack to be erected in lieu of emission control devices which would amount to a wholesale amendment of the Pennsylvania plan.

If the plaintiff has any complaints about stays of proceedings or has any other remedies against the Pennsylvania authorities, it appears that it has ample means of securing extensions and so forth if the same are proper under 35 P.S. 4004 (subsection 4.1) wherein it is provided:

> "An appeal to the hearing board of the department's order shall not act as a supersedeas: provided however that upon application and for cause shown the hearing board of the Commonwealth court may issue such supersedeas. Any person aggrieved by an adjudication of the hearing board may appear to the Commonwealth court."

This court has no disposition to interfere with the administrative procedures under Pennsylvania law which appear to be comprehensive and capable of handling any complaints, constitutional or otherwise, which may be made by the plaintiffs. Particularly is this so when it appears we have no jurisdiction as heretofore determined over the Federal Administrator, and any such

orders against the state authorities would be exercises in futility.

For the above reasons, we determine that this court has no jurisdiction of this suit and an appropriate order will be entered.

Order

AND NOW, to wit, June 19, 1974, for reasons set forth in the foregoing opinion and after consideration of the briefs and arguments of counsel and the court being of the opinion that it has no jurisdiction in the premises,

IT IS ORDERED that this action and the complaint filed herein be dismissed for lack of jurisdiction.

WILLIAM W. KNOX
United States District Judge

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MICHAEL RODAK, JR., CLERK

75-974

In the Supreme Court of the United States

October Term, 1975
No. 74-2050

WEST PENN POWER COMPANY,
a Corporation,

Petitioner

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, MAURICE K. GODDARD, Individually and as Secretary of the Department of Environmental Resources and the DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania,

Respondents

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FOR RESPONDENTS MAURICE K. GODDARD AND THE DEPARTMENT OF ENVIRONMENTAL RESOURCES, COMMONWEALTH OF PENNSYLVANIA

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392, renumbered and amended October 20, 1965, Pub. L. 89-272, Title I, §101 (2) (3), 79 Stat. 992; November 21, 1967, Pub. L. 90-148, §2, 81 Stat. 485, 42 U.S.C. §1857, et seq. (1969 ed.):

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COUNTER-STATEMENT OF THE CASE

Petitioner bases its appeal on the argument that since it has a variance from the Pennsylvania sulfur dioxide emission standards granted by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the United States Environmental Protection Agency ("EPA") should not be allowed to enforce these same standards under the Federal Clean Air Act. DER and its Secretary, Maurice K. Goddard ("Goddard"), assert that Petitioner's argument is not well-grounded either in fact or law.

As to the factual situation, on page 8 of the statement of the case section of its petition for writ of certiorari in the above-captioned matter, Petitioner states that "On September 13 1973, despite the pendency of Petitioner's variance application which, as provided by the implementation plan, operated as an automatic stay of prosecution, the Administrator issued to Petitioner a notice of violation . . . which asserted, *inter alia,* that Boiler No. 33 was in violation of the sulfur emission standards contained in the Pennsylvania implementation plan."

DER and Goddard submit that, to the extent that an "automatic stay of prosecution" existed on September 13, 1973 pursuant to §141.5 of DER's rules and regulations, this stay expired on September 19, 1973 when DER issued an order to Petitioner requiring compliance with said sulfur emission standards on or before June 30, 1976 since a stay of prosecution under §141.5 terminates under that

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section when DER acts upon the variance application. Moreover, the DER order of September 19, 1973 which appears as Exhibit A hereto and was presented to the Court of Appeals for the Third Circuit ("Court of Appeals") as Petitioner's Exhibit "B", was conditioned upon Petitioner's full compliance with a schedule or timetable providing for the planning, purchasing, construction, and installation on site of the necessary emission control equipment.

There is no evidence in the record to indicate that Petitioner has complied with any of the conditions set forth in the variance order of September 19, 1973 and, to the contrary, DER submits that Petitioner has not so complied with those conditions. Thus, said variance order itself forms no stay of prosecution. Moreover, Petitioner appealed the order of September 19, 1973 to the Pennsylvania Environmental Hearing Board pursuant to Pennsylvania's Administrative Agency Law and Administrative Code of 1929 and this Board has not yet issued an adjudication based upon said appeal. Pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. §510-1921-A, no action of DER shall be final until a person aggrieved thereby exhausts his right of appeal to the Environmental Hearing Board. Therefore Petitioner cannot rely upon said variance order, which is not yet a final order, as a stay of prosecution.

Finally, DER would emphasize the material contained in the footnote on page 10 of Petitioner's petition for writ of certiorari. As is noted there, the Petitioner has already obtained from the Court of Appeals a stay of all EPA enforcement activities until thirty days following the disposition by said Court of Appeals of the Petitioner's petition

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for review of the sulfur dioxide emission limitations contained in the Pennsylvania implementation plan. To the knowledge of DER the Court of Appeals has issued no final opinion concerning said petition for review.

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RESPONDENTS REQUEST TO BE STRICKEN AS PARTIES SHOULD THIS COURT ISSUE A RULE 25 ORDER GRANTING THE REQUESTED WRIT

DER and Goddard recognize that they are deemed to be parties before this Court in this matter pursuant to Rule 21 (6) of this Court since they were at least nominal parties before the Court of Appeals whose judgment is herein sought to be reviewed. DER and Goddard further recognize that this Court will not receive a motion to dismiss an entire petition for a writ of certiorari, Rule 24 (2).

Nevertheless, pursuant to Rule 24 (2) this Court apparently does consider objections to jurisdiction which are presented, as here, in briefs in opposition to petitions for certiorari.

Furthermore, it would appear that, along with an order granting a writ for certiorari under Rule 25, this Court could order that DER and Goddard be stricken as parties.

DER and Goddard submit that those portions of the lower Court opinions which dismissed the action below as to them have not been raised as issues for review by this Court. Wherefore, Petitioner should be deemed to have waived its arguments with regard to the status of the Respondents, DER and Goddard, as parties hereto by failure to raise these issues in its petition.

In support of this argument Respondent herein would respectfully direct this Court's attention to the following portions of the record.

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In its opinion, reprinted as Appendix B to the Petitioner's petition beginning at 42a, the United States District Court for the Western District of Pennsylvania granted the motions to dismiss of both DER and Goddard. A review of the opinion beginning at 54a indicates that the dismissal as to DER was on the basis of the Eleventh Amendment to the Constitution of the United States while that Court found it did not have jurisdiction over Goddard to require him to modify or amend the Pennsylvania state implementation plan.

The Court of Appeals noted in its opinion as reprinted at page 11a of the Petitioner's petition that Petitioner's motion for reconsideration challenged only the dismissal as to Goddard and not the dismissal as to DER. Thus, Petitioner abandoned its attempts to implead DER at the Court of Appeals level.

As to Goddard's status, the Court of Appeals, as reported on page 16a of the Petitioner's petition, held that "The APA [Administrative Procedure Act] provides, in certain instances, for judicial review of agency action. 5 U.S.C. §701 (b) (1) defines 'agency' as 'each authority of the Government of the United States. . . .' The APA does not extend the state agencies. Thus, it could not afford the District Court jurisdiction of West Penn's suit against Goddard, who is Secretary of a Pennsylvania agency." The reasons for granting the writ of certiorari advanced by Petitioner do not assign as an error of the Court of Appeals to be reviewed on certiorari by this Court the aforequoted construction "agency action" under the APA. No other ground of jurisdiction is pressed in said petition. Thus, even if all of the arguments set forth in Petitioner's petition find merit with this Court, the deci-

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sion of the Court of Appeals to dismiss the action with respect to Goddard and the decision of the United States District Court for the Western District of Pennsylvania to dismiss the action with regard to DER should stand as the law of this case and these parties should be stricken as parties to the instant action.

Whether or not this Court decides that DER and Goddard should remain as parties to this matter, the following arguments address the issue of whether the writ should be granted. If this Court decides that DER and Goddard should be stricken as parties then the following remarks are to be construed as the arguments of an amicus curiae.

REASONS FOR DENYING THE WRIT

A. The issues raised in this appeal are moot. Pursuant to Rule 19 of this Court "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore." Keeping this guideline in mind, it should be quite obvious that a writ of certiorari should not be issued in a matter which has become moot. In fact, such a situation would be the opposite of the situation necessitating the issuance of a writ since there would be no important or special reason for the issuance of the writ in a moot situation. The relief initially requested by Petitioner in the District Court and then in the Court of Appeals, to wit, an injunction against the enforcement of a notice of violation issued by EPA until it obtained a declaratory judgment as to whether Petitioner's "tall stack strategy" could produce compliance with the Pennsylvania state implementation plan, has, in fact, already been granted.

As is noted on page 10 in the footnote of the Petitioner's petition and the counter-statement of the case herein, the Petitioner herein has also petitioned the Court of Appeals for review of the Pennsylvania state implementation plan with regard to its tall stack strategy for meeting sulphur dioxide emission standards and said matter is pending before the Third Circuit Court of Appeals.

Furthermore, as noted in the same footnote, on May 19, 1975 the Third Circuit Court of Appeals issued a stay of all enforcement activities by the Administrator of EPA

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pending its decision on said petition for review. It is the understanding of DER and Goddard that the Administrator of EPA and the Petitioner have requested the Court of Appeals to approve extensions of said stay through the present date and that said Court of Appeals has granted said extensions. It would therefore appear to be a waste of this Court's valuable time to consider further the above-captioned matter.

B. In addition to the mootness of the appeal, DER and Goddard respectfully suggest that the reasons, individually and collectively, set forth in the numbered paragraphs of Petitioner's petition for granting the writ do not constitute the necessary special and important reasons for issuing the writ, but rather represent specious and questionable arguments concerning a soundly-reasoned opinion of a Court of Appeals.

---

1. State variance does not stay federal enforcement.

The first reason offered by Petitioner for granting the writ is (at numbered paragraph 1) that review of the decision of the Court of Appeals is necessary to clarify federal-state relationships under the Clean Air Act. In this argument, Petitioner, having discussed this Court's opinion in *Train vs. NRDC, Inc.*, 43 U.S.L.W. 4467 (U.S. April 16, 1975), 7 ERC 1735, characterizes the instant case as presenting an important corollary, to wit, whether the Administrator of EPA may ignore a valid variance provision of a state implementation plan by taking enforcement action which conflicts with the provisions of the plan.

Actually, the *Train* case reemphasizes the need for approval of a variance by EPA before that variance can be

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considered a part of a state implementation plan under the Clean Air Act. In reaching its decision in that matter this Court upheld the construction of the Clean Air Act profferred by EPA rather than that profferred by certain of the United States Courts of Appeal. At 7 E.R.C. 1739 this Court held that "Without going so far as to hold that the agency construction of the act was the only one it permissibly could have adopted, we conclude that it was, at the very least, sufficiently reasonable that it should have been accepted by the reviewing Court." In this matter EPA and DER, the relevant administrative agencies, both agree that the enforcement activities of EPA are not suspended *per se* by the existence of a variance granted by the state agency unless and until that variance is adopted by EPA as part of the state implementation plan.

Moreover, the Third Circuit Court of Appeals has demonstrated in the instant matter, a swell as in *Getty Oil vs. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), cert. denied 409 U.S. 1125 (1973), that it knows how to cure the so-called *Getty Oil* dilemma, i.e., federal enforcement pending state review of its implementation plan, by issuing a stay of enforcement against the EPA Administrator where it deems that step to be necessary and/or desirable.

To hold that federal enforcement of a state implementation plan can be automatically suspended by a "proposed" revision to a state implementation plan notwithstanding EPA'S refusal to adopt said revision to that plan would go against the entire history of and need for the Clean Air Act as painstakingly set forth in the *Train* case, supra. As this Court noted in *Train,* it is the obligation of EPA to determine compliance of a state implementation plan with achievement of national ambient air quality

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goals. The interpretation profferred by Petitioner would frustrate this clear statutory purpose by collapsing the federal state structure to a single layer in which a state could for example, grant a variance on an illegitimate basis and thereby stop EPA as well as its own regulatory agency from taking enforcement action.

Furthermore, even if it is assumed for the sake of argument that on the date that the notice of violation presently appealed was issued an automatic stay of prosecution was in effect in Pennsylvania as to both the Pennsylvania DER, and EPA under 25 Pa. Code §141.5, it is also true that as of September 19, 1973, the date upon which DER issued its variance order, said automatic stay of execution terminated by the terms of §141.5. Thus, following September 19, 1973, the only obstacle to enforcement action was pursuant to the terms and conditions of the order itself.

As stated above in the counter-statement of the case, the aforesaid order (which is attached as Exhibit A) granted a variance running to and including June 30, 1976 with regard to emissions of sulphur compounds. However, the foregoing variance was granted on condition that the obligations set forth in paragraphs a, b, c, d, e, and f of the order were fully met, within the time specified for compliance and, ". . . on the following further conditions: (1) on or before April 1, 1974, details of the company's plan shall be submitted to the Department [DER] setting forth a detailed description of the methods or devices to be used to control the sulphur dioxide emissions from Boiler No. 33 and a schedule indicating the dates upon which intermediate steps of the plan are to be completed; (2) purchase orders for equipment necessary for compliance with

paragraph of this order shall be placed no later than July 1, 1974, and proof thereof shall be submitted to the Department within five (5) days after such orders are placed; (3) on-site construction or installation of the emission control equipment shall be initiated on or before December 1, 1974 . . ."

There is no evidence on the record that Petitioner has complied with any of the aforesaid conditions. To the contrary, DER respectfully submits it has not received any of the aforesaid plans or purchase orders, nor has construction or installation been initiated in accordance with the aforesaid order. For this reason, whatever protection the aforesaid variance granted against either the state or federal enforcement activities, said variance has become ineffective by the terms of that variance due to the conduct of Petitioner itself and cannot, at this point in time, act as a defensive shield of the Petitioner against either DER or EPA.

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2. This matter is not ripe for judicial review.

The point raised at paragraphs numbered 2 through 5 of Petitioner's petition, which deal with questions of statutory construction under the Federal Administrative Procedure Act, 5 U.S.C. §§701 et seq., individually and collectively, present no meaningful question to this Court. Assuming for the moment that the Petitioner is correct in its assertion in numbered paragraph 2 that the Administrative Procedure Act, 5 U.S.C. §702, creates an independent jurisdictional grant to the United States District Courts; assuming, as Petitioner suggests in paragraph 3, that the issuance of a notice of violation by the Administrator of EPA is not such "action committed to agency dis-

cretion by law" as to fall under the exclusionary wording of the Administrative Procedure Act, 5 U.S.C. §701 (a) (2); and assuming, further, that the notice of violation presently appealed is a "final agency action", as that term is defined under 5 U.S.C. §704, as suggested in Petitioner's paragraph 4, it, nevertheless, fails to follow that Petitioner is entitled to its day in the federal District Court in this proceeding.

In *Abbott Laboratories vs. Gardner,* 387 U.S. 136 (1967), and *Toilet Goods Association vs. Gardner,* 387 U.S. 156, 87 S.Ct. 1520 (1967), this Court found that, even in those instances where the Administrative Procedure Act would otherwise create an opportunity for judicial review, this opportunity was discretionary on the part of the Court whose review was solicited and the prospective reviewing Court still must determine whether the matter was ripe for judicial review. As this Court stated at *Abbott Laboratories,* supra, at pages 148 and 149, "The injunctive and declaratory remedies are discretionary, and courts traditionally have been reluctant to apply these to administrative determinations unless these arise in the context of a controversy ripe for judicial resolution . . . the problems is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

The District Court for the District of Delaware in *Getty Oil vs. Ruckelshaus,* 342 F. Supp. 1006 (DC Del.), 4 ERC 1141 (affirmed and cert. denied supra), withheld jurisdiction to review an order of EPA which is surely, a more "final" act than, as here, a mere notice of violation. The District Court of Delaware found that, although the Administrative Procedure Act did provide a jurisdictional

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grant and while review was not foreclosed on the basis of §307 of the Clean Air Act, at least for questions which could not have been raised in the context of an originally filed 307 petition, that Court would refrain from exercising its discretion to grant a stay of enforcement.

In affirming the District Court, the Third Circuit Court of Appeals, in effect, held that the requested stay, which would be a preliminary injunction, was barred by the existence of an adequate remedy at law and/or Plaintiff's failure to exhaust its exclusive statutory remedy, to wit, Plaintiff's failure to pursue a §307 petition to review the state implementation plan before said Court of Appeals.

Since, as stated above, Petitioner has obtained a stay of EPA enforcement of the Pennsylvania state implementation plan provisions with regard to sulphur dioxide pending a decision on its petition for review of those provisions filed with the Third Circuit pursuant to §307, there is no hardship to Petitioner if the District Court refrains from exercising whatever jurisdiction it may have in the instant matter. Furthermore, the matter is much more fit for judicial review under Petitioner's petition to review than in the instant matter. Therefore, under the two-fold test set forth in *Abbott Laboratories* and utilized in, *inter alia, Toilet Goods Association* and *Getty Oil* the present matter was properly dismissed by the Courts below.

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3. *Issuance of a notice of violation by EPA under the Federal Clean Air Act is not a final agency action under the Administrative Procedure Act.*

The preceding assumption of the finality of agency action was made for the sake of argument only. Actually,

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it is the position of DER and Goddard that the Third Circuit Court of Appeals properly resolved all of the questions as to finality of agency action and to this extent said opinion is adopted and incorporated by reference herein. Of special interest is that portion of the Court of Appeals' opinion, reprinted on page 18a of the Petitioner's petition, which holds that a notice of violation is not an appropriate decision point in the administrative procedure to enable a Court to adequately address the issues therein. As the Court of Appeals notes, the state implementation plan standards themselves are analogous to the regulations reviewed in *Abbott Laboratories,* supra, and would have provided a ground for review. Of course, such a review was provided as of statutory right under §307 of the Clean Air Act, but the present Petitioner failed to avail itself of that section. However, the notice of violation issued under the implementation plan is not a "final agency action" or an appropriate review point, since, under section 113a (4), of the Clean Air Act, a petitioner has the right, following receipt of a notice of violation, to discuss the allegations set forth therein and the remedies therefor with EPA at an administrative conference. 42 U.S.C. §1857C 8(a) (4). Only after this conference may the Environmental Protection Agency issue a compliance order. Obviously, it is only after the conference and following the issuance of a specific order that a given "source" understands the manner and the timing in which it is to come into compliance with a state implementation plan.

It is only following these steps that EPA has completed its administrative function of applying its expertise to the particular factual situation of a given "source" and it is only upon such a record that a Court may adequately exercise its rightful judicial review. All the cases cited in

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Petitioner's petition on the ripeness issue bear out the above-stated principle set forth in *Abbott Laboratories,* supra, that judicial review of agency action should not be exercised until the agency's expertise is fully exercised; an action is simply not "final" before this point. (Also see *Federal Power Commission vs. Hope Natural Gas Company,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333; *Rochester Telephone Company vs. U.S.,* 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147; *Federal Power Commission vs. Metropolitan Edison Company,* 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408.)

The due process argument set forth at numbered paragraph 5 of the Petitioner's petition is in reality a ripeness argument in other dress. Essentially, Petitioner repeats its statement that it is somehow unfair to subject Petitioner to the potential of enforcement actions before it has a chance to obtain judicial review of the state implementation plan upon which said actions could be based. Of course, in the instant situation the Petitioner has obtained the stay of enforcement that it solicited at both the state and federal levels. However, even if it had not so obtained a stay at this time, DER and Goddard suggest that the Court of Appeals' arguments with respect to due process were correct and that the instant Petitioner has no right to more than one meaningful day in Court. In this regard, the above-named persons also accept and incorporate by reference the reasoning of the Delaware District Court set forth in *Getty Oil,* supra. Finally, in regard to due process, since due process is, as this Court has often noted, based upon the judicial implementation of an underlying concept of fairness, the above-named persons must point out that the Petitioner is the party seeking to utilize an unfair procedure. It is the Petitioner which is attempting, on the

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one hand, to overturn the variance order issued September 19, 1973 by DER in proceedings before the Pennsylvania Environmental Hearing Board and at the same time to use this variance order to protect itself against enforcement actions by both DER and EPA. To compound the unfairness of Petitioner's actions it is seeking to utilize a variance order based upon conditions which it has not fulfilled as a defensive shield.

CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,
DENNIS J. HARNISH
Spec. Ass't. Attorney General
Attorney for Maurice K. Goddard and the Department of Environmental Resources

Of Counsel:

WILSON OBERDORFER, Director,
Bureau of Legal Services

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APPENDIX—EXHIBIT A
(Petitioner's Exhibit "B")

COMMONWEALTH OF PENNSYLVANIA
Department of Environmental Resources
Fulton National Building
200 North Third Street
P. O. Box 2063
Harrisburg, Pa. 17120

September 19, 1973

Certified Mail #143736

West Penn Power Company
800 Cabin Hill Drive
Greensburg, Pennsylvania 15601

Attention: Mr. Ralph J. Gunkle, Jr.
Secretary-Treasurer

Order No. 73-708-V

Gentlemen:

ORDER GRANTING TEMPORARY VARIANCE

Pursuant to Chapter 141, Section 141.2 of the Rules and Regulations of the Department of Environmental Resources, the West Penn Power Company submitted a petition for a temporary variance dated September 15, 1972 and amended on June 7, 1973 requesting a variance from the air contaminant emissions limitations of Sections 123.11, 123.22 and 123.41 of Chapter 123 for the four boilers located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania. Said

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petition indicated that said source is presently emitting air contaminants in violation of the limitations set forth in Sections 123.11, 123.22 and 123.41 and is causing air pollution as defined in the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S., §4001, et seq.

The petition as amended seeks a variance from the particulate matter and visible emissions limitations of Sections 123.11 and 123.41 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until November 1, 1973 for Boiler No. 33. The petition also seeks a variance from the sulfur compound emissions limitations of Section 123.22 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until June 30, 1985 for Boiler No. 33. Boilers Nos. 1, 2 and 3 are to be converted to oil firing by January 18, 1974. Two alternate plans have been proposed for control of sulfur dioxide emissions from Boiler No. 33. Alternate I provides for the installation of a stack which the company believes would achieve compliance with the ambient air quality standards only, by April 1, 1977 but would not achieve compliance with the emission standards until June 30, 1985. Alternate II provides for the installation of sulfur dioxide control equipment with compliance being obtained by April 1, 1978 or an extended period thereafter.

Upon a review of the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and accompanying materials, testimony (if any) received at public hearing, and upon other information available to the Department dealing with the availability of technology to control sulfur dioxide emissions, the Department finds that:

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1. The granting of such a variance may prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder.

2. Alternate I does not provide for compliance with Section 123.22 in a reasonable time period and is therefore not acceptable to the Department.

3. The granting of the variance, as requested, for implementation of Alternate II is not reasonable inasmuch as the intermediate dates, and the completion date set forth in the petition do not indicate that the company intends to effect the control of the source as quickly as is reasonably practicable.

Now Therefore, this 19th day of September, 1973, the Department hereby grants a variance and further orders that the West Penn Power Company, its successors and assigns, shall:

(a) on or before June 30, 1976 complete the implementation of Alternate II of the control plan set forth in the aforementioned amended petition for a variance, which plan is hereby incorporated herein and made a part hereof;

(b) complete implementation of the control plan with respect to the control of particulate matter and sulfur compound emissions from Boilers Nos. 1, 2 and 3 and particulate matter emissions from Boiler No. 33 on or before the dates specified in the amended petition which are respectively January 18, 1974 and November 1, 1973;

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(c) on and after January 18, 1974 operate its Boilers Nos. 1, 2 and 3 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of air contaminants to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(d) on and after November 1, 1973 operate its Boiler No. 33 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of particulate matter and visible emissions to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(e) on and after June 30, 1976 operate its aforementioned Boiler No. 33 in such a manner as to maintain the emissions of sulfur compounds to within the limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; and

(f) submit quarterly progress reports to the Department of Environmental Resources, commencing on October 1, 1973 and continuing thereafter until compliance with paragraph (a) of this order is achieved:

The foregoing variance is granted on condition that paragraphs (a), (b), (c), (d), (e) and (f) of the foregoing order are complied with within the time specified for compliance and on the following further conditions:

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(1) On or before April 1, 1974, details of the company's plans shall be submitted to the Department, setting forth a detailed description of the methods or devices to be used to control the sulfur dioxide emissions from Boiler No. 33 and a schedule indicating the dates upon which each intermediate step of the plan is to be completed;

(2) Purchase orders for equipment necessary for compliance with paragraph (a) of this order shall be placed no later than July 1, 1974, and proof thereof shall be submitted to the Department within five (5) days after such orders are placed;

(3) On-site construction or installation of emission control equipment shall be initiated on or before December 1, 1974.

(4) On-site construction or installation of emission control equipment shall be completed on or before June 1, 1976.

(5) Specifications for a continuous sulfur dioxide and percent opacity stack monitoring and recording system shall be submitted to the Department for approval on or before December 1, 1974.

(6) Commencing July 31, 1975, quarterly monitoring reports containing sulfur dioxide concentrations and percent opacity readings shall be submitted to the Department in accordance with guidelines provided by the Department.

Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.

Nothing contained in this order shall be construed to prevent or limit the application of the provisions of Chap-

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ter 137 of the Rules and Regulations of the Department of Environmental Resources which relates to air pollution episodes.

Chapter 127 of the Rules and Regulations of the Department of Environmental Resources requires plan approval prior to the construction or modification of an emission source. Applications for such plan approval are enclosed. Please complete these forms and return them, in duplicate, with the plan details required in special condition (1) of this order to Mr. Nicholas Pazuchanics, Regional Air Pollution Control Engineer, Room 850, Kossman Building, 100 Forbes Avenue, Pittsburgh, Pennsylvania 15222.

Any questions in connection with this action of the Department of Environmental Resources, as well as all progress reports, should be directed to the Bureau of Air Quality and Noise Control, Department of Environmental Resources, Fulton National Building, 200 North Third Street, Post Office Box 2063, Harrisburg, Pennsylvania 17120.

Very Truly yours,
JAMES K. HAMBRIGHT, Chief
Division of Abatement & Compliance Bureau of Air Quality & Noise Control

Attachments

Notice of Appeal
Rules of Practice and Procedure
Rules & Regulations of the Department of Environmental Resources
Applications for Chapter 127
Exhibit "A"—Petition for Variance

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that copies of this document have been served upon:

Solicitor General of the U.S., Robert Bork,
Department of Justice
Washington, D.C. 20530

Attention: John E. Varnum, Esq.
Appellate Section
Department of Justice

and

Lawrence A. Demase, Esq.
Rose, Schmidt and Dixon
919 Oliver Building
Pittsburgh, Pa. 15222

by depositing same in the United States mail.

DENNIS J. HARNISH, ESQ.
For Respondent Respondents DER and Maurice K. Goddard

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